TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1905.

No. [redacted] 31.

GREENLIEF W. SIMPSON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 18, 1904.

(19,362.)

(19,362.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 264.

GREENLIEF W. SIMPSON, APPELLANT,

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 3, 1904.

1 In the Court of Claims.

GREENLIEF W. SIMPSON
vs.
THE UNITED STATES. } No. 21739.

I.—*Petition.* *Filed March* 5, 1900.

Your petitioner respectfully represents:

1. That heretofore, to wit, on the twenty-second day of December, A. D., 1898, the United States, by and through their legally constituted officer in that regard, who had full authority so to do, invited by advertisement sealed proposals for furnishing fresh beef, delivered in quarters, to the United States troops stationed at posts and camps in the interior of the island of Cuba for the period ending June thirtieth, 1899, a copy of which advertisement is hereunto annexed and made a part hereof, marked "Exhibit A;" that reference was therein made to letter soliciting proposals, dated November fifth, 1898, containing specifications to be adhered to in furnishing the said fresh beef, a copy of which said letter is hereunto annexed and made a part hereof, marked "Exhibit B."

2. That, pursuant to the said advertisement and letter (Exhibits A and B), petitioner submitted, by sealed proposal, a bid to supply the materials called for in the said advertisement, and accom-
2 panied his said bid with the guarantee of two responsible guarantors, who bound themselves as in said advertisement required, and he in all other respects complied with the said advertisement in making said bid, a copy of which said proposal is hereunto annexed and made a part hereof, marked "Exhibit C."

3. That claimant was the lowest bidder, and the award to that effect was duly made to him, and thereafter, to wit, on the fourth day of January, 1899, a contract was duly entered into between Charles P. Eagan, on behalf of the United States, and claimant, for the furnishing of the said fresh beef, a copy of which contract is hereunto annexed and made a part hereof, marked "Exhibit D."

4. That prior to and on the fourth day of January, 1899, when said contract was entered into, there was an interior post or camp in the island of Cuba known as Quemados, at and from which supplies were furnished to about ten thousand troops located in and near said camp, about which number continued to be kept and supplied at and in the immediate vicinity of said post or camp until the end of the contract period; that immediately upon entering into said contract claimant made all the necessary preparations, at large expense, to wit, thirty-five hundred dollars, to supply said interior post or camp, and was then and there and at all times thereafter until the end of said contract period able, willing, and ready to supply said fresh beef at said post or camp and offered so to do, but the

defendant, by and through its officers, refused to permit him to supply the fresh beef necessary for the said troops at the said camp and to be supplied therefrom, but procured, without right, the supplies of such material from others; that on or about the twenty-sixth day of February, 1899, claimant was notified by the officers and agents of the defendant to begin the supply of fresh beef at said post or camp on the first day of March, 1899, and claimant immediately began the supplying
3 of said fresh beef pursuant to said notice, and so continued to do until the fourteenth day of March, A. D. 1899, when, without right and against his protest, he was refused the right under his contract to continue to deliver said fresh beef, although he was able, willing and ready to continue the delivery thereof, as the said contract required, and from the said fourteenth day of March, 1899, until the end of the contract period he was denied the right to deliver the said fresh beef called for by the said contract, against his protest, until the end of the said contract period, he being able, willing and ready at all times to comply with said contract according to its provisions and requirements; that against the action of the defendant, through the refusal of its officers and agents to permit him to perform his part of said contract, he at all times protested and informed the said defendant of his ability, willingness and readiness to comply with every provision of said contract, and he avers that at no time was he in default in any respect in regard to the performance of the said contract by him.

5. That the amount of fresh beef required at the said post or camp between said date of contract and the first day of March, 1899, was about five hundred and sixty thousand pounds, which amount claimant was able, willing and ready to deliver, as required, according to said contract, as hereinbefore averred; that during the contract period, between the fourteenth day of March and the end of the contract term, the amount of fresh beef required at the said post or camp was about one million and eighty thousand pounds, which the claimant was able, willing, and ready to deliver as required, but the said defendant, without right and against the protest of the claimant, refused to permit him to deliver the same; that said defendant procured the required supplies, during the two periods just mentioned, from others, which under said contract the claim-
4 ant had the right and, as above averred, was able, willing, and ready to deliver as required.

6. That the cost to him of furnishing the said fresh beef at the said point, as required by said contract, was not to exceed ten and one-half cents a pound; that the net profit to him under said contract would have been, had he been permitted to comply with the same, not less than four cents a pound, aggregating sixty-five thousand six hundred dollars for the one million six hundred and forty thousand pounds, to which amount he has been damaged by the refusal of the defendant to permit him to comply with said contract.

7. That at the time the said bids were invited, as hereinbefore set forth, also at the time the claimant made his proposals, and also at the time of the execution of the said contract, it was understood and agreed that said proposals and contract should cover all the fresh beef required in the island of Cuba for the subsistence of troops, whether needed at interior points or at ports on the coast, and the said bids were invited and were made with reference to the contractor being obligated to the Government to supply all the fresh beef required in the island of Cuba, whether at interior points or at ports of entry; that defendant had entered into a contract with Swift and Company, by which the said Swift and Company agreed to ship from ports within the United States refrigerated beef for points or ports on the coast of the island of Cuba, and the said contract for refrigerated beef and the said contract with claimant for fresh beef were together to cover all the beef to be supplied for the use of the troops on the said island of Cuba, and the claimant was at all times able, willing and ready to furnish all the fresh beef required or needed by the Government at ports on the coast of Cuba, and so informed the proper officers and agents of the defendant; that on the twenty-fifth day of January, 1899, the claimant was notified by the proper officer and agent of the defendant to supply fresh beef at Cienfuegos and Cardenas, which are seaport towns, and claimant supplied the same as required, pursuant to the said notice, and continued so to do until the end of the contract period; that defendant refused to permit the claimant to supply fresh beef at Havana and Matanzas, both of which are ports of entry, from the date of the execution of said contract until the first day of March, 1899, although he was able, willing and ready so to do, but procured from others the supplies of fresh beef needed and required at said cities, against the protest of said claimant; that claimant was called upon and permitted to furnish fresh beef at Havana from March first, 1899, to March fourteenth, 1899, both inclusive, and at Matanzas from March first, 1899, to March thirty-first, 1899, both inclusive, but was denied the right to furnish said fresh beef at said cities after the respective dates mentioned, and the said defendant procured from others, against the protest of said claimant, the fresh beef required at said cities until the end of the contract period.

8. That the quantity of fresh beef required by the Government at Havana, and which the claimant was entitled to supply, between the date of said contract and the first day of March, 1899, was two hundred and twenty-four thousand pounds, and between the said fourteenth day of March, 1899, and the end of the contract period four hundred and thirty-two thousand pounds, aggregating six hundred and fifty-six thousand pounds; that the quantity required at Matanzas, and which the claimant was entitled to supply, between the date of said contract and the first day of March, 1899, was two hundred and six thousand pounds, and between the said thirty-first day of March and the end of the contract period three hundred and seventy-

eight thousand pounds, aggregating five hundred and eighty-
6 four thousand pounds; that claimant was able, willing and ready at all times to supply the fresh beef required at said cities of Havana and Matanzas, and offered so to do, and he avers that at no time was he in default in any respect in regard to the performance of the said contract by him.

9. That the profit to him for supplying the said six hundred and fifty-six thousand pounds of fresh beef at Havana would have been four cents a pound, and for supplying the said five hundred and eighty-four thousand pounds at Matanzas would have been three and one-half cents a pound, making a total of forty-six thousand six hundred and eighty dollars.

10. That he is a resident of the city of Boston, State of Massachusetts, and a citizen of the United States, and that he has at all times borne true allegiance thereto; that he is the sole owner of the said claim; that no transfer or assignment of the same or any part thereof or of any interest therein has ever been made by him, and that he is justly entitled to the amount herein claimed, to wit, the sum of one hundred and fifteen thousand seven hundred and eighty dollars, after allowing all just credits and set-offs.

Wherefore claimant prays that a judgment may be entered against the United States in favor of claimant, Greenlief W. Simpson, in the said sum of one hundred and fifteen thousand seven hundred and eighty dollars.

GREENLIEF W. SIMPSON, *Claimant.*

J. M. WILSON,
Attorney for Claimant.

STATE OF MASSACHUSETTS, }
County of Suffolk, } ss:

Greenlief W. Simpson, the claimant in the above case, on solemn oath says that he has heard read the foregoing petition by him subscribed and is acquainted with the contents thereof, and that the matters and things in said petition set forth are true, as he verily believes.

——— ———.

Subscribed and sworn to before me this third day of March, A. D. 1900.

ARCHIE G. CROSBY.

{Seal of Archie G. Crosby, Notary Public for the Commonwealth of Massachusetts, U. S. A.}

7 EXHIBIT A.

"Subject: Beef for interior points in Cuba.

"WAR DEPARTMENT,
"OFFICE COMMISSARY GENERAL OF SUBSISTENCE,
"WASHINGTON, *December* 22, 1898.

"SIR: Sealed proposals for furnishing slaughtered fresh beef delivered in quarters to U. S. troops stationed at posts and camps in the interior of the island of Cuba for the period ending June thirtieth, eighteen ninety-nine, will be received by the Commissary General of Subsistence, War Department, Washington, D. C., until twelve o'clock noon, January third, eighteen ninety-nine, and opened immediately thereafter in presence of bidders, deliveries to be in such quantities at such times and in such places as the commissaries of the troops to be supplied shall designate. The numbers and locations of such troops are unknown at this time, and bids must be made upon this understanding. Specifications same as contained in letter soliciting proposals, dated November fifth. Each bid must be accompanied by guarantee of two responsible guarantors binding themselves to pay difference in money between amount of bid and that of next higher bidder to whom contract is awarded if bidder fails to enter into contract with good and sufficient sureties within ten days after award made. Bids not accompanied by guarantee will not be considered.

"Very respectfully, CHAS. P. EAGAN,
"*Commissary General of Subsistence.*"

EXHIBIT B.

"WAR DEPARTMENT,
"OFFICE COMMISSARY GENERAL OF SUBSISTENCE,
WASHINGTON, *November* 5, 1898.

"SIR: The letter of this office of October 24 having stipulated that the cattle for furnishing beef for troops in Cuba must come from outside of cattle-fever regions, and this office having since learned that cattle from outside of such regions are attacked by fever within ten days after landing in that island, all proposals received under said letter have been rejected without being opened, and the following solicitation for proposals is made, viz:

"Sealed proposals for furnishing fresh beef (slaughtered, dressed, and delivered in quarters) to the U. S. troops stationed at posts remote from the seacoast in the island of Cuba for the period ending June 30, 1899, will be received by the Commissary General of Subsistence, War Department, Washington, D. C., until 12 o'clock noon,

November 15, 1898, and opened immediately thereafter in presence of bidders. Deliveries to be made in such quantities, at such times, and in such places as the commissaries of the troops to be supplied shall designate. The numbers and locations of such troops are unknown at this time, and bids must be made upon this understanding.

"Beef to be good in quality and condition, fit for immediate use, from fore and hind quarters proportionally, including all the best cuts thereof, necks cut off at the fourth vertebral joint, breasts trimmed down, shanks of forequarters cut off four inches above the knee joint, of hindquarters eight inches above the hock joint;
8 necks, shanks, kidney tallow, and beef from bulls and stags and from females (except spayed heifers) to be excluded. The cattle for furnishing the beef must dress not less than 400 pounds per carcass. Bidders will state how soon they can begin delivering, which must be at the earliest date practicable, and will state the price per pound at which their beef is offered.

"Beef cattle, or dressed beef, imported into Cuba for the purposes of this contract will be admitted free of duty.

"Beef presented for delivery not of the kind stipulated for will be rejected by the commissaries, subject to appeal to commanding officers, whose decisions will be final.

"The successful bidder will be required to give bond in the sum of $10,000 for the faithful performance of his contract.

"Address proposals in sealed envelopes marked 'Proposal for beef in Cuba,' or by telegraph, to the undersigned, at the War Department, Washington, D. C.

"Very respectfully, CHAS. P. EAGAN,

"*Commissary General of Subsistence.*"

EXHIBIT C.

Copy of Proposal.

"Riggs house; O. G. Staples, proprietor.

"WASHINGTON, D. C., *January 3d*, 1899.

"Brig. Gen. C. P. Eagan, commissary of subsistence.

"DEAR SIR: In accordance with the terms of specifications sent from your office under dates of November 5th, and December 22d, 1898, I will furnish beef for the United States troops at posts in the interior of Cuba at 14½c. per pound.

"Very respectfully, G. W. SIMPSON,

"*27 South Market Street, Boston, Mass.*"

9 EXHIBIT D.

Copy of Contract.

"Articles of agreement entered into this 4th day of January, 1899, between Brigadier General Charles P. Eagan, Commissary General of Subsistence, United States Army, of the first part, and Greenlief W. Simpson, of the city of Boston, county of Suffolk, State of Massachusetts, of the second part.

"This agreement witnesseth, that the said party of the first part, for and in behalf of the United States of America, and the said party of the second part, for himself and his legal representatives, have mutually agreed, and by these presents do mutually agree, as follows, viz:

"I. The said party of the second part shall deliver, to the commissaries of the United States troops stationed at such posts and camps as are situated in the interior of the island of Cuba, at such prescribed hours on such days as, under the direction of their commanding officers they shall designate, such quantities of FRESH BEEF, slaughtered, dressed and delivered in quarters, good in quality and condition, fit for immediate use, and from fore and hind quarter meats proportionally, including all the best cuts thereof, as from time to time they may require. Necks shall be cut off at the fourth vertebral joint, and breasts trimmed down; the shanks of fore quarters shall be cut off four inches above the knee joint, and of hind quarters eight inches above the hock joint. Necks, shanks, and kidney tallow, and beef from bulls and stags, and from females (except from spayed heifers) shall be excluded from delivery. The cattle for furnishing the beef must dress not less than four hundred (400) pounds per carcass. Cattle imported into Cuba by the party of the second part for the purposes of this contract are to be admitted free of duty.

"II. Whenever the fresh beef presented at any post for delivery under this contract is, in the opinion of the commissary thereat, not of the kind stipulated for, he shall reject the same, subject to
10 appeal by the party of the second part to the commanding officer, whose decision shall be conclusive on all persons concerned.

"III. In case of failure of the said party of the second part to deliver fresh beef as herein stipulated, the commissary is authorized to supply by open purchase any deficiency resulting from such failure (the beef so procured to be of the kind herein specified, as nearly as practicable), and the said party of the second part shall be charged with any excess of cost over that of furnishing at contract price.

"IV. The said party of the second part shall receive for the fresh

beef accepted from him hereunder, fourteen and one-half (14½) cents per pound to be paid by the commissary at the end of each calendar month, or as soon as practicable thereafter, in the funds furnished for the purpose by the United States.

"V. No member of, or delegate to, Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

"VI. This contract shall be in force from the 5th day of January, 1899, to the 30th day of June, 1899, inclusive, or such less time for any post as the Commissary General of Subsistence, U. S. Army, may direct.

"In witness whereof the undersigned have hereunto placed their hands the date first hereinbefore mentioned.

"CHAS. P. EAGAN,
"*Brigadier General, U. S. Army,*
"*Commissary General of Subsistence.*
"GREENLIEF W. SIMPSON.

"Witnesses:
"W. L. ALEXANDER,
"*Residence, Washington, D. C.*
"R. S. KEARNEY,
"*Residence, Alexandria Co., Va.*"

"WAR DEPARTMENT,
"OFFICE COMMISSARY GENERAL OF SUBSISTENCE,
"WASHINGTON, D. C., *January* 25, 1899.

"OFFICIAL COPY respectfully furnished to the chief commissaries of subsistence of departments in the district of Cuba for reference to the commissaries at posts and camps in the interior of the island of Cuba for their information.

"GEORGE B. DAVIS,
"*Acting Commissary General of Subsistence.*"

11 II.—*Traverse. Filed March* 23, 1904.

In the Court of Claims of the United States, December Term, A. D. 1903.

GREENLIEF W. SIMPSON
vs.
THE UNITED STATES. } No. 21739.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

III.—*Argument and Submission of Case.*

This case was argued on the 23d and 24th days of March 1904, and submitted.

12 IV.—*Findings of Fact and Conclusion of Law. Filed by the Court.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact. Filed Apr. 4, 1904.

I.

Claimant is a citizen of the United States, a resident of Brookline, Massachusetts; that he has at all times borne true allegiance to the United States; that he is the sole owner of the claim embraced in this suit, and that no transfer or assignment of said claim, in whole or in part, or of any interest therein, has ever been made by him.

II.

On October 24, 1898, defendant solicited proposals for "furnishing fresh beef (slaughtered, dressed, and delivered in quarters) to the U. S. troops stationed at posts *remote* from the seacoast, in the island of Cuba, for the period ending June 30, 1899." Said invitation for proposals contained, among others, the condition that the cattle so furnished should come from outside of cattle-fever regions; which condition defendant thereafter reconsidered and withdrew, and accordingly all proposals received in response to said invitation were rejected unopened.

III.

Thereupon, under date of November 5, 1898, defendants invited new proposals for "furnishing fresh beef (slaughtered, dressed, and delivered in quarters) to the U. S. troops.

A true copy of said invitation for proposals of November 5, 1898, is set forth in the petition herein.

13 IV.

The defendant, under date of November 15, 1898, made award of said contract to the lowest bidder. The latter, however, failed to enter into said contract, as did also the next lowest bidder; and thereupon, under date of December 22, 1898, defendant again solicited proposals.

A true copy of said invitation for proposals of December 22, 1898, is set forth in said petition.

V.

Pursuant to the advertisement last aforesaid, claimant, under date of January 3, 1899, made and filed with defendant a proposal to furnish said beef at 14½ cents per pound.

14 VI.

Claimant was the lowest bidder, and was accordingly awarded the contract under date of January 4, 1899, and formal contract, in writing was on the same day entered into between claimant and defendants.

VII.

During the period in which the above several invitations for proposals were made for furnishing fresh beef (slaughtered, dressed, and delivered in quarters) to the United States troops stationed at "posts *remote* from the sea-coast" (as per invitations of October 24 and November 5, 1898), and at "posts and camps in the *interior* of the island" (as per invitation of December 22, 1898), there was a subsisting contract between defendant and Swift & Co., of Chicago, Illinois, dated July 1, 1898, for furnishing "refrigerated, chilled, or frozen fresh beef in bulk, delivered at points on the *seacoast* of Cuba, occupied by the army," the beef to dress 600 pounds to the carcass. Said contract was to cover a period of at least three months, with the right of extension to December 31, 1898, if military occupation of the island continued to that date, and, by mutual agreement, subject to further extension, not beyond June 30, 1899.

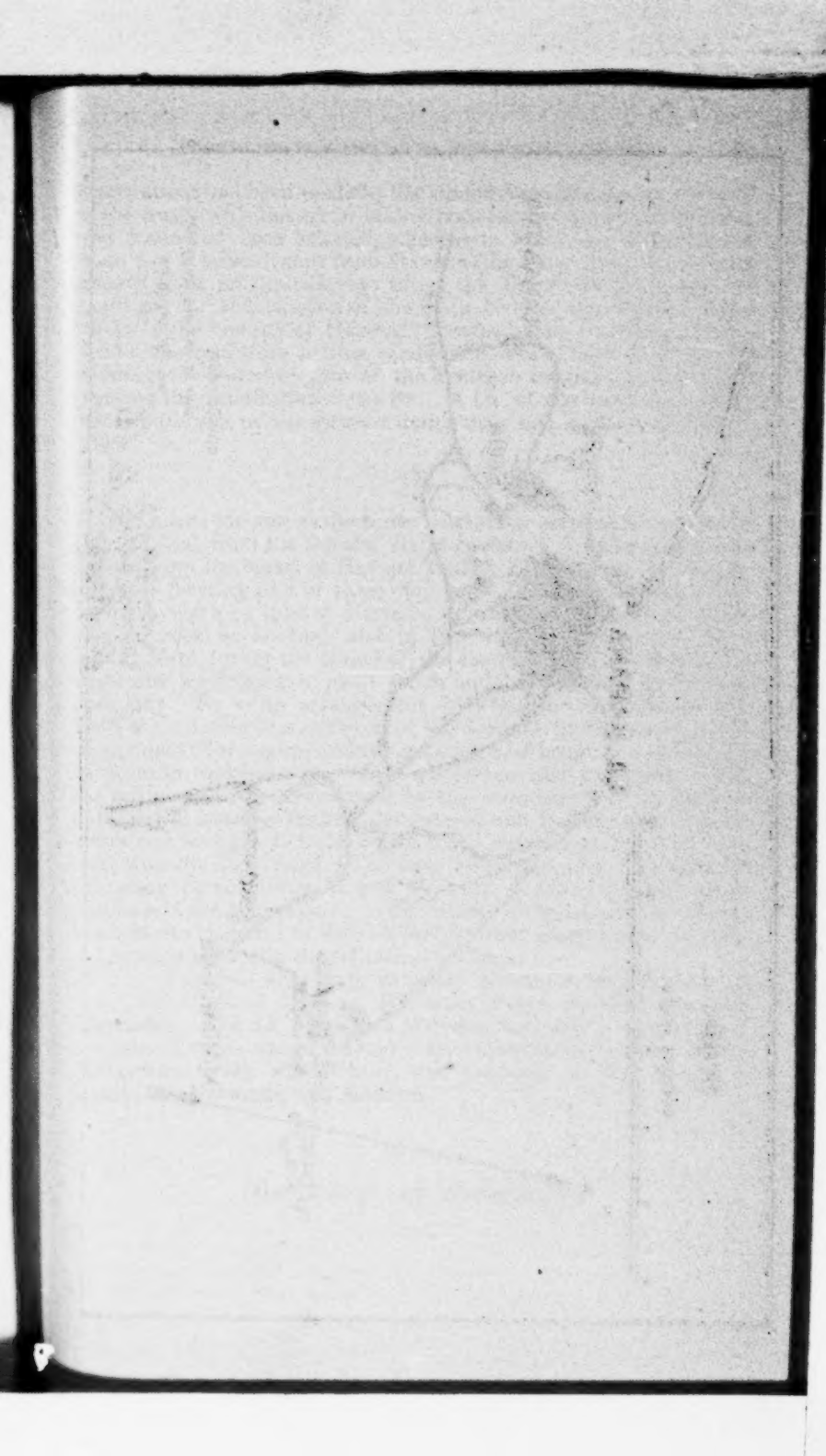
This contract required the erection, operation, and maintenance by Swift & Co. of certain refrigerator plants or buildings on the *seacoast* of the island of Cuba for the purpose of receiving and storing said shipments of beef.

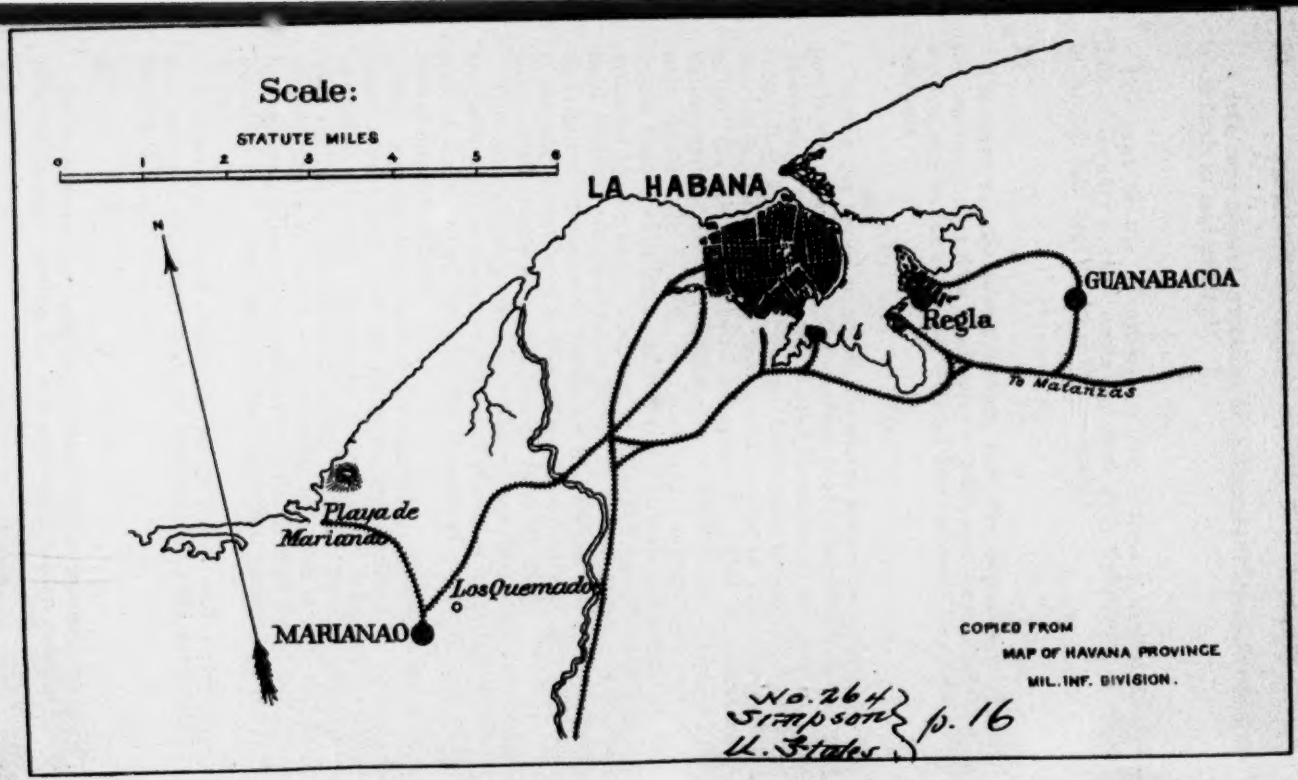
Said contract with Swift & Co. expired on December 31, 1898, as therein provided; and the latter having declined to agree to an extension, although thereunto requested by defendant, proposals were invited by defendant February 6, 1899, "for furnishing refrigerated, chilled, or frozen beef, in bulk, delivered at such points and in such quantities on the *seacoast* of Cuba as shall from time to time be called for." Said contract was thereafter awarded to said Swift & Co.

A true copy of said invitation for proposals and a true copy of said contract with Swift & Co., of February 23, 1899, are set forth in finding XX.

15 VIII.

Prior to entering into the contract with claimant, hereinbefore referred to, and during the fall and early winter months of 1898,

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STATUTE MILES
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LA HABANA
GUANABACOA
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MARIANAO
COPIED FROM
MAP OF HAVANA PROVINCE
MIL. INF. DIVISION.
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Simpson
U. States
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preparations had been made by the United States (under the protocol of the treaty with Spain) for taking possession of the island of Cuba, and a site had been selected, adjacent to Marianao, at Quemados, some 8 or 9 miles distant from Havana (the latter being the nearest *seacoast* point on the island to which the United States transports could go), for the location of the main body of the United States troops in the vicinity of Havana. Troops began to arrive, and the defendant, from time to time, made purchases of beef on the island pending the entering into of the Simpson contract, as well, also, pending the establishment, by Swift & Co., of the necessary refrigerator buildings on the seacoast under their said contract of July 1, 1898.

IX.

Los Quemados was, at the times hereinafter referred to, a town in Cuba distant from the Concha Railway station 6 miles which was distant from the wharf at Havana 2 miles, as shown on the map or diagram forming part of these findings. It was distant 2½ miles from the beach or inlet of Marian-o, at which place, however, there was no dock or landing, and, in fact, no military supplies were landed there during the period of the contract. At Los Quemados there was a refrigerator plant which had been erected by Swift & Company. By some arrangement between the commissary and Swift & Company this refrigerator was utilized by the commissary department "for storing and refrigerating beef bought for the troops in order to make the meat more wholesome and palatable." But the refrigerator was never used by the commissary or by Swift & Company as a storage for beef slaughtered and dressed in the United States and brought to Cuba by Swift & Company under their contract with the defendants. The facts relating to beef furnished for the army by the claimant and by Swift & Company and other parties and the facts relating to the refusal of the defendants' officers to allow the claimant to furnish beef at that place under his contract appear in the following findings:

16 The following map correctly illustrates the location of the cities of Habana, Marianao, Playa de Marianao, and Quemados. The dot just above Marianao and near the junction of the two railroads, shown on said map, indicates the location of the refrigerator from which beef was supplied to the troops at Quemados, Marianao, and Habana.

(Here follows map marked p. 16.)

17 X.

On the 10th January, 1899, the claimant was ready to furnish beef on the coast of Cuba under his contract referred to in finding 1. He notified Lieut. Col. Abiel L. Smith, chief commissary of the division of Cuba and also depot commissary at the port of Havana, that he was ready and willing to deliver beef under his contract. On the 26th January, 1899, he demanded of Colonel Smith that he be allowed to furnish beef at Los Quemados, where there were stationed at the time about 7,000 troops. Colonel Smith refused to allow the claimant to deliver, and he thereupon protested against the decision of the chief commissary and also cabled his protest to the commissary-general at Washington, and on the 30th January also sent to Colonel Smith a protest in writing, which protests were in the words following:

"My agreement General Egan I supply all troops except when supplied by Swift, Smith continues buying other parties principal points, this unjust, must cease, cable him orders, answer."

* * * * * * *

"I hereby beg to file a protest against your awarding any contract for supplying fresh beef to the troops stationed on the island of Cuba as I still maintain that in accordance with my agreement with Gen. Egan, that I am to furnish all the fresh beef required for the troops, the only exception being that furnished under contract with Messrs. Swift & Company."

On the 27th January, 1899, Colonel Smith cabled the commissary-general at Washington as follows:

"I request instructions in regard to receiving beef from Simpson's contract at 14½ cents in Havana and other coast points when the supply of refrigerated beef fails, or whether I should endeavor to purchase for immediate needs at lower rate. The arrangement heretofore made expired, and as supply of refrigerated beef is only sufficient for few days, the rights of Simpson must be settled immediately."

To this Acting Commissary-General Davis replied January
18 27, 1899:

"Simpson's contract embraces posts and camps in interior of island and not seacoast points."

On January 28, 1899, Colonel Smith wrote the claimant as follows:

"I have the honor to inform you that the commissary-general has decided that your contract covers delivery 'at posts and camps in interior of island and not seacoast points.' Therefore, purchases at seacoast points have to be made in open market when the supply of refrigerated beef is not available."

During the remainder of the month of January and during the month of February the chief commissary at Havana purchased beef on the hoof for the use of the troops at Los Quemados from third parties; that is to say, neither from the claimant nor Swift & Company, obtaining the same at the rate of 10½ cents per pound.

For the month of February a contract was entered into between Colonel Smith and one Juan Dorta, and on the 10th February, 1899, Colonel Smith telegraphed the commissary-general, "Agreement with Juan Dorta for purchase of beef here during February at 10½ cents has been made and can not be broken by me." Whereupon, on February 11, 1899, Acting Commissary-General Davis telegraphed to Simpson, at Boston, Mass.:

"You understand we can not, in interpretation made yesterday, abrogate contract with Dorta for this month, but will prevent any new ones from being made." To which the claimant replied, February 11, 1899, as follows:

"Your telegram is duly received, and I fully understand that the contract of Dorta can not be abrogated. You informed me that Swift & Co., had arranged to make two shipments of beef, which will probably furnish all the troops will require for this month, which will cancel Dorta's agreement, and I am convinced that he will be glad to be relieved from furnishing any more beef at
19 10½ cents. I trust there will be no further misunderstanding, and shall do all in my power *of* carry out the contract in a manner satisfactory to yourself, the commissary department, and the troops as well."

On the 19th February, 1899, the commissary-general cabled Colonel Smith as follows: "Call upon Simpson in future without further competition when refrigerated beef is not available." On the 21st February Colonel Smith notified the claimant as follows:

"SIR: I have to advise you that, acting under instructions contained in telegram of the commissary general of the 10th instant, I have instructed commissaries throughout the island to call upon you to furnish fresh beef under your contract whenever Swift & Co., cannot deliver fresh beef (refrigerated) under their contract."

Under this authority the claimant furnished the beef at Los Quemados from the 1st to the 13th of March, 1899, inclusive, under and at his contract rates, and was fully paid therefor.

On March 10 Colonel Smith cabled the commissary-general, "Have refused native beef from Swift until I receive instructions requested the sixth instant," to which Captain Davis (who, up to the 3d of March had been acting commissary-general, but who was not commissary-general on the 10th of March) replied:

"If Swift & Co., furnish refrigerated beef acceptable to you, quality according to contract, from refrigerator, it is in compliance with contract, even if not sent in transports. Agreement accepted only when transportation fails. We can not allow for transportation."

As this decision made the acceptance depend on the beef being of the "quality according to (Swift's) contract," Colonel Smith, who had not yet been furnished with copy of Swift's new contract, telegraphed March 10, 1899:

"Swift can not furnish beef which will dress 600 lbs., but can

furnish as good as Simpson. Shall I accept from Swift beef
20 of quality specified in Simpson's contract, but refrigerated
here, at Swift's contract price? No copy of Swift's new contract yet received."

Major Davis decided by telegraph on March 11, 1899:

"Quality being same, take Swift's. Price lower. See letter February 10, 1899."

In consequence of these instructions Colonel Smith ceased to take beef from the claimant after the 13th of March, and accepted Cuban beef from Swift & Company at a lower price than that which was to be paid the claimant. The claimant protested against this.

On the 4th May, 1899, the Secretary of War decided,

"1. That the camp at Quemados is an interior post within the meaning of the language used in the contract with Simpson dated January 4, 1899.

"2. That the claim of contract right to supply said fresh beef to the troops stationed at said point is sustained.

"3. The attention of the commissary department is directed to paragraph VI of said contract with Simpson, which reads as follows:

'VI. This contract shall be in force from the 5th day of January, 1899, to the 30th day of June, 1899, inclusive, or such less time for any post as the commissary general of subsistence, U. S. Army, may direct.'

"4. The commissary-general of subsistence is at liberty to take such action under this provision of the contract as in his judgment the best interests of the Government require."

Under this authority of the Secretary of War, on the 9th May, 1899, the commissary-general sent the following notice to the claimant:

"You are informed that the suspension of the delivery of fresh
beef under your contract as per notification to you from Major
21 A. L. Smith, chief commissary, division of Cuba, dated March
12, 1899, is hereby made to cover the life of the contract in so far as it relates to the post of Quemados. This annulment of your contract for this point is in accordance with a suggestion of the acting Secretary of War, dated May 4, 1899, and by the authority conferred in paragraph VI of said contract."

The claimant would have realized a profit upon the beef furnished at his contract price at Los Quemados if he had been allowed to furnish it.

If the claimant is entitled to recover profits for all of the beef which he was not allowed to furnish at Los Quemados between January 10 and June 30, 1899, he should recover $31,439.90.

If he is entitled to recover for only the beef which he was prevented from furnishing at Los Quemados between the 10th January and the 9th May, 1899, he should recover $29,398.42.

22 XI.

For several months prior to entering into said contract by claimant, the latter had investigated the conditions existing on the island of Cuba; had ascertained that the ration of beef for a soldier in Cuba was one pound per man per day; and that from 25,000 to 30,000 soldiers, possibly more, would be quartered on the island; all of which matters were taken into account by claimant in computing his contract price. The post and camp at Quemados was maintained throughout the term of the Simpson contract, some 7,000 soldiers being quartered there at or about the beginning of his said contract term, and additional troops sent there, numbering in all, at said post and camp, some 16,000 men in February, 1899, and about 10,000 in March, 1899; and said post and camp was continued until the final withdrawal of the volunteers from the island, which was subsequent to the expiration of the Simpson contract, July 1, 1899.

XII.

Prior to entering into said contract claimant inquired of the then United States commissary general, Charles P. Eagan (by, through, and under whom said contract was to be made), to ascertain the exact extent and scope thereof, and from him ascertained that it was the purpose and intent of the department to cover the *entire* beef supply for the island of Cuba by the two contracts, Swift & Co. for *refrigerated* beef slaughtered in the United States and delivered at points on the *seacoast* of the island, and claimant (Simpson) for *fresh* beef slaughtered, dressed, and delivered at posts and camps in the *interior* of the island, and that, when Swift & Co. could not so furnish, claimant's contract covered the *entire* island, both *interior* and *seacoast*.

XIII.

That claimant made all necessary arrangements, at considerable expense, preparatory to entering into and performing said contract with defendant (dated January 4, 1899, as aforesaid), in the matter of securing cattle, engaging steamer space for their transportation, etc., etc.; in addition to which he secured and employed agents upon the island of Cuba in the matter of making delivery to defendant of the beef aforesaid, and also sent there an agent in that behalf from the United States, who, arriving there on January 10, 1899, reported to said chief and depot commissary, Lieut. Col. Smith, U. S. A.

23 XIV.

That the cost to claimant of delivering beef to defendant, under his said contract at Quemados, was 10½ cents per pound; his contract price therefor was 14½ cents per pound, thus leaving him a profit of 4 cents per pound upon all beef delivered, or which, under his said contract, he was entitled to deliver to defendant at said place.

XV.

The total amount of beef purchased by and supplied to defendant from and by others than claimant at said *interior* post or camp of Quemados, during the term of claimant's said contract (excluding the period of *fourteen* days in March, 1899, aforesaid), was 785,997½ pounds.

XVI.

The *first* contract between defendant and Swift & Co. for furnishing refrigerated, chilled, or frozen beef, slaughtered in the United States, and to be delivered at points on the *seacoast* of Cuba (*supra*), expired by limitation on December 31, 1898. The subsequent and *second* contract between defendant and said Swift & Co. (covering the same subject-matter) was not entered into until February 23, 1899 (*supra*).

Intermediate said two dates, as well also subsequent to the date of said *second* contract with Swift & Co., and against the protest of claimant, defendants purchased (from others than claimant) beef slaughtered in Cuba, and used, with or without refrigeration, at the city of Havana and at Matanzas, Cuba, from January 1 to June 30, 1899, covering the term of claimant's contract, as aforesaid, aggregating 683,924 pounds, as follows:

Name.	City of Havana.	Matanzas.	Total quantities.
	Lbs.	*Lbs.*	*Lbs.*
Pryor, Davis and Hall	120,427	72,469	192,896
Juan Dorta	100,780	.....	100,780
Juan E. Ramirez	....	119,530½	119,530½
Total	....	.....	413,206½
Swift & Co. furnished to the United States beef slaughtered in Cuba	....		270,717½
Grand total	....		683,924

24 On the 18th of January, 1899, the chief commissary of Cuba, A. L. Smith, ordered claimant to supply beef at coast points as follows:

"OFFICE PURCHASING AND DEPOT
"COMMISSARY, U. S. ARMY,
"HAVANA, CUBA, *January* 18, 1899.

"G. W. Simpson (care J. F. Berndes & Co.), box 349, Havana, Cuba.

"SIR: I have to inform you that I have this day notified, by

wire, the commissaries at the following points to call on you for fresh beef, under your contract, from and after date opposite each.

* * * * * * *

"Trinidad, January 23, 1899.

* * * * * * *

"Cienfuegos, January 21, 1899.

* * * * * * *

"Respectfully, A. L. SMITH,
"*Lieut. Col., C. S., U. S. A.,*
"*Chief Commissary, Division of Cuba.*"

And on the 25th of January his order for beef at *coast points* was as follows:

"OFFICE PURCHASING AND DEPOT
"COMMISSARY, U. S. ARMY,
"HAVANA, CUBA, *January* 25, 1899.

"G. W. Simpson, Havana, Cuba.

"SIR: In accordance with your verbal request of today, I have to advise you that the following points are to be supplied by you under your contract.

* * * * * * *

"Trinidad.
"And until Swift & Co. are prepared to furnish:
"Cienfuegos.
"Cardenas.
"In addition the following points named by Colonel Wilson in telegram of the 12th instant. Copy enclosed.

"Respectfully, A. L. SMITH,
"*Lieut. Col., C. S., U. S. A., Chief and Depot C. S.*"

On February 18, 1899, Major A. L. Smith telegraphed from Havana:

"Please inform me if Simpson should in future be called upon without further competition to supply beef here and elsewhere in Cuba when refrigerated beef is not available. Immediate decision urgently needed."

The answer of Acting Commissary General Davis, February 19, 1899, was:

"Call upon Simpson in future without further competition when refrigerated beef is not available."

25 On February 20, 1899, Major A. L. Smith telegraphed to the commissaries at Matanzas, Pinar del Rio, Guanajay, Cienfuegos, Trinidad, Sancti Spiritus, Nuevitas, Puerto Principe, Gibara, and Manzanillo, as follows:

"Under authority of telegram of the Commissary General of 19th instant, you are directed to call in future on Simpson for fresh beef, without further competition, when refrigerated beef is not available."

Of these Matanzas, Cienfuegos, Trinidad, Gibara, and Manzanillo were on the coast.

Thereafter Colonel Smith wrote as follows:

"HEADQUARTERS DIVISION OF CUBA,
"OFFICE CHIEF COMMISSARY,
"HAVANA, *February* 21, 1899.

"Mr. G. W. Simpson (c/o J. F. Berndes and Co.), 64 Cuba, Havana.

"SIR: I have to advise you that, acting under instructions contained in telegram of the Commissary General of the 19th instant, I have instructed commissaries throughout the island to call upon you to furnish fresh beef under your contract whenever Swift and Co. cannot deliver fresh beef (refrigerated) under their contract.

"Respectfully,
A. L. SMITH,
"*Lt. Colonel, C. S., U. S. Army,*
"*Chief and Depot Commissary.*"

And on February 23, 1899, Captain Peterson, depot quartermaster at Matanzas, addressed Simpson as follows:

"MATANZAS, CUBA, *February* 23, 1899.

"G. W. Simpson & Co., 64 Cuba, Havana, Cuba.

"DEAR SIRS: Please prepare to supply the following quantities of fresh beef at the places designated on and after March 1st, 1899:

"About 4,500 lbs. daily at Matanzas.

"About 275 lbs. daily at Cardenas.

"About 275 lbs. daily at La Union.

"It will be necessary for you to slaughter on or prior to the 28th inst. to make the issue for March 1st, 1899.

"Very respectfully,
M. R. PETERSON,
"*Captain C. S., U. S. Army,*
"*Purchasing and Depot Commissary.*"

26 XVII.

Claimant was at all times during the entire contract period aforesaid able, ready, and willing to furnish and supply the beef aforesaid, and protesting against the action of defendants in ignoring the same (*supra*).

XVIII.

The beef last hereinabove referred to was slaughtered on the island of Cuba and used, with or without refrigeration, and purchased from divers persons, including said Swift & Co. In making such pur-

chases from Swift & Co. defendant waived the express provisions of the contract with said firm in that behalf, requiring such beef to be slaughtered in the United States, and delivered, refrigerated, chilled, or frozen, at points on the *seacoast*; as well, also, waived the contract provision as to said Swift & Co., that the beef should dress not less than 600 pounds to the carcass.

XIX.

The cost to claimant of delivering beef to defendant, under his said agreement and contract, at the city of Havana was ten cents per pound, and, at Matanzas, was 11 cents per pound; his said contract price, covering both places, was 14½ cents per pound, thus leaving him a profit of 4½ cents and 3½ cents per pound respectively upon all beef delivered, or which under his said agreement and contract he was entitled to deliver to defendant at said two places, or an *average* profit of 4 cents per pound covering said two places.

Estimating said quantity of 683,924 pounds (*supra*) at a profit to claimant of 4 cents per pound upon the beef so purchased and used by defendant at the city of Havana and at Matanzas during the period of claimant's contract (said quantity having been furnished and supplied by others than claimant, in violation of his said contract and rights, and against his protest, as aforesaid), the same would have yielded claimant a profit, and to which profit he was entitled, aggregating the sum of $27,356.96, no part of which said sum has, however, been paid him.

27 XX.

The following proposal and contract was also entered into between the United States and Swift & Co.

WAR DEPARTMENT,
OFFICE COMMISSARY-GENERAL OF SUBSISTENCE,
WASHINGTON, *February* 6, 1899.

Proposals will be received at this office until 12 o'clock noon, February 16, 1899, at which time they will be opened in the presence of bidders for furnishing refrigerated, chilled, or frozen beef, in bulk, delivered at such points and in such quantities on the seacoast of Cuba as shall from time to time be called for by the Commissary-General of Subsistence of the United States Army.

The Government will furnish the steamers for the transportation of beef from points on the coast of the United States to Cuba.

The contractor will be required to build and operate such refrigerator plants at Cuban points as may be required to keep an ample supply of beef on hand. Transportation from the United States for material required for the construction of these refrigerator plants and for the men to operate them will be furnished by the Government.

The beef shall be of uniform good quality from fat steers, United States Government inspected, weighing not less than six hundred (600) pounds dressed weight per carcass. It is to be free from fore and hind quarters porportionally, including all the best cuts thereof; necks cut off at the fourth vertebral joint and breasts trimmed down; shanks of forequarters cut off four inches above the hock joint and of the hindquarters eight inches above the hock joint; necks, shanks, and kidney tallow excluded from delivery. The beef is to be properly clothed for its protection and proper handling, and so preserved by the refrigeration on shipboard and at the refrigerator buildings as to be at all times perfectly good and fit for use. The successful bidder will be required to give a bond for his compliance with his contract under this advertisement. No bids will be considered which are not in strict compliance with each and every requirement of this advertisement. Envelopes containing proposals will be marked: "Proposals for fresh beef, to be opened February 16th," and addressed to Colonel George B. Davis, acting Commissary-General of Subsistence, Washington, D. C.

Articles of agreement entered into this twenty-third day of February, eighteen hundred and ninety-nine, between Colonel George B. Davis, acting Commissary-General of Subsistence, United States Army, of the first part, and Swift and Company, a corporation existing under the laws of the State of Illinois, doing business in the city of Chicago, county of Cook, and State of Illinois, of the second part.

This agreement witnesseth, that the said party of the first part, for and in behalf of the United States of America, and the said party of the second part, for themselves and their legal representatives, have mutually agreed and by these presents do mutually agree as follows, viz:

I. The party of the second part shall furnish to the United States, for the use of the Army of the United States, such quantities of refrigerated, chilled, or frozen beef in bulk, delivered at points on the seacoast of the island of Cuba, occupied by the Army of the United States, as shall from time to time be called for by the acting Commissary-General of Subsistence of the United States Army. The party of the second part shall be required to make shipments only at such ports of the United States as have tracks connecting railroads with docks, whereby shipments of fresh beef may be transferred directly from cars to ship refrigerators.

II. Army transports will be provided for the purpose of carrying refrigerated, chilled, or frozen beef under this contract, but if it shall, in the opinion of the acting Commissary-General of Subsistence, be necessary to equip with refrigerating apparatus steamships in addition to those now in the military service so equipped, the party of the second part shall, at their own expense, equip the additional num-

ber that the acting Commissary-General of Subsistence shall require, not exceeding three. The refrigerators to be supplied to these additional ships shall be of such size as the acting Commissary-General of Subsistence shall direct, but of size not less than three hundred thousand (300,000) pounds each, it being understood that the amount of beef of each cargo shall be reasonably commensurate with the capacity of the refrigerating plant aboard the vessel. They
28 shall also at their own expense provide and operate refrigerator buildings at such points in the island of Cuba occupied by the Army of the United States as may be necessary for carrying out the object of this contract, and shall move the same from point to point on the seacoast as may be necessary for the support of moving troops. They shall keep not less than two experts with each cargo on shipboard and after landing and until the beef is delivered to the proper officers of the Government. It being understood that the party of the first part will furnish locations for such refrigerators under military protection, and as near the point of transfer as the commanding general can designate, at which ships carrying the refrigerated meats shall land for the discharge of said shipments. The party of the first part is to furnish free transportation and sell at cost price the necessary subsistence stores on shipboard for two men in charge of the refrigerator on each ship; also to furnish free transportation and sell at cost price the necessary subsistence stores for such men and free transportation for materials and supplies as may be necessary for the construction and operation of such refrigerators in the ports of the island of Cuba as may be required for the proper carrying out of this contract.

III. The fresh beef to be furnished by the party of the second part under this contract shall be of uniform good quality from fat steers, United States Government inspected, weighing not less than six hundred (600) pounds dressed weight per carcass, and shall be refrigerated, chilled, or frozen in quantities according as it shall be called for by the acting Commissary-General of Subsistence, United States Army. It is to be from fore and hind quarter beef proportionally, including all the best cuts thereof; necks cut off at the fourth vertebral joint and breasts trimmed down; shanks of forequarters cut off four inches above the knee joint and of the hindquarters eight inches above the hock joint; necks, shanks, and kindney tallow excluded from delivery. The beef is to be properly clothed by the party of the second part for its protection and proper handling, and so preserved by refrigeration on shipboard and at the refrigerator buildings referred to in article II hereof as that it shall be perfectly good and fit for issue.

IV. All refrigerators, machines, and fittings provided by the party of the second part shall remain the property of said party, and the party of the first part shall furnish steam for hoisting beef and for operating the refrigerating machines on shipboard, but all loading and unloading to be at the expense of the party of the second part,

provided, that the party of the first part shall furnish such lighterage and docking facilities as may be necessary.

V. Any loss from perils of war or from acts of the public enemy shall be borne by the United States and all loss from ordinary perils of the sea and acts of God shall be borne by the party of the second part.

VI. Whenever the fresh beef presented at the steamships or at the refrigerator buildings in the island of Cuba for delivery under this contract is, in the opinion of the receiving commissary, not of the kind, quality, or condition stipulated for, he shall immediately apply to the commanding officer at the point of delivery for a board of officers, to consist of as many members, not exceeding three, as can be assembled. The board shall at once examine the beef presented, and its findings, when approved by the commanding officer, shall be conclusive in regard thereto.

VII. Whenever, because of delay in transportation, unexpectedly light demand for beef by the army in the ports of the island, or other cause not foreseen, there shall be a liability that any of the beef may become stale and unfit for use, the second party's representative shall be privileged, after first obtaining consent of the commanding officer at the point in question, to sell under such conditions as he may prescribe, a portion or all of said beef in the open market, but such action shall be with a view to prevent losses and shall in no wise affect the rights of the parties or their responsibilities for any losses that may occur, which rights and responsibilities shall be determined by the other articles of this contract without regard to this article.

VIII. The said party of the second part shall receive for the fresh beef accepted from them hereunder, ten and ninety-three one hundredths ($10\frac{93}{100}$) cents per pound, to be paid by the commissary at the end of each calendar month or as soon as practicable thereafter, in the funds furnished for the purpose by the United States.

IX. No member of, or delegate to, Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

29 X. The party of the first part, acting for and on behalf of the United States, hereby guarantees the party of the second part that this contract shall be and remain in force for all the refrigerated, chilled, or frozen fresh beef needed by the United States, at posts on the seacoast of the island of Cuba, during the period commencing the ninth day of February, eighteen hundred and ninety-nine, and ending the 30th day of June, eighteen hundred and ninety-nine.

In witness whereof, the party of the first part has hereunto set his hand; and the party of the second part has caused this contract to

be signed in the corporate name by the president and the corporate seal affixed, the date first hereinbefore written.

GEORGE B. DAVIS,
Colonel, U. S. A., Acting Commissary-General of Subsistence.
SWIFT AND COMPANY,
By G. F. SWIFT, *President.*

Witness:
R. S. KEARNEY,
Alex. Co., Va.

Attest:
D. E. HARTWELL, *Secretary.*

(Executed in quintuplicate.)

XXI.

The cities of Habana and Matanzas are seacoast points, and were supplied by refrigerated beef under the contract with Swift & Co., whenever the same was obtainable, and when not obtainable by beef purchased from other parties at the rate of 10 cents per pound, which were slaughtered on the island and stored in the refrigerators. The commissary-general declined and refused to permit the claimant to supply beef at these points.

XXII.

All the beef which was actually supplied by Simpson and received by the United States from him has been duly paid for at his contract price.

Conclusion of Law.

Upon the foregoing findings of fact, the court decides, as a conclusion of law, that the petition be dismissed.

BY THE COURT.

30 V.—*Judgment of the Court.*

GREENLIEF W. SIMPSON
vs.
THE UNITED STATES. } No. 21739.

At a Court of Claims held in the city of Washington on the 4th day of April 1904 judgment was ordered to be entered as follows:

The court on due consideration of the premises finds for the defendants and do order adjudge and decree that the petition of the claimant, Greenlief W. Simpson, be and it is hereby dismissed.

BY THE COURT.

(The court filed no opinion in this case.)

31 VI.—*Application for and Allowance of Appeal.*

GREENLIEF W. SIMPSON
v.
THE UNITED STATES.

Comes now Greenlief W. Simpson, the above named claimant, by his attorney of record, and prays an appeal to the Supreme Court of the United States, from the final judgment of this court dismissing his petition.

A. A. HOEHLING, JR.,
Attorney for Claimant.

Filed April 25, 1904.

Ordered that this appeal be allowed as prayed for.

BY THE COURT.

April 25, 1904.

32 In the Court of Claims.

GREENLIEF W. SIMPSON.
vs.
THE UNITED STATES. } No. 21739.

I, John Randolph, assistant clerk of the Court of Claims, certify that foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the judgment of the court dismissing the petition, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 29 day of April, A. D. 1904.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 19,362. Court of Claims. Term No. 264. Greenlief W. Simpson, appellant, *vs.* The United States. Filed May 18", 1904. File No. 19,362.

FILE COPY.

FILED
OCT 12 1905
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 31.

GREENLIEF W. SIMPSON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

JOHN S. BLAIR,
A. A. HOEHLING, JR.,
Attorneys for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 19602

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 31.

GREENLIEF W. SIMPSON, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

PLEADINGS.

Claimant, Greenlief W. Simpson, filed petition in the Court of Claims, March 5, 1900, seeking to recover the amount of profit which, as alleged, he could have made under a certain written contract with defendant, dated January 4, 1899, for supplying fresh beef to the United States troops stationed at *interior* posts and camps, on the island of Cuba, during the period of the contract term, namely, January 10, 1899, to June 30, 1899, inclusive (exclusive of fourteen days, March 1 to 14, 1899), but which contract right, at the *interior* post and camp of Quemados, was denied him by defendant (*R.*, *1–4*).

That amount, if recoverable at all, is, as found by the court below, either $31,439.90 or $29,398.42, accordingly as one or the other of two named dates shall be adopted as the expiration or legal termination of the contract term,

as will be hereinafter more fully referred to and explained (*R.*, *14*).

Claimant also sets up the contract right during the period aforesaid, covering the supply of fresh beef used by defendant at the cities of Havana and Matanzas, (being points on the *seacoast* of Cuba,) when Swift & Company, (who were then under contract with defendant to furnish refrigerated, chilled, or frozen beef for points or ports on the coast of Cuba,) did not supply the same; and, for the denial of which claimed contract right, recovery was also sought herein for the amount of profit claimant could have made (*R.*, *1–4*).

That amount, if recoverable at all, is, as found by the court below, $27,356.96 (*R.*, *19*).

The case was argued orally before the court, upon evidence taken on behalf of both claimant and defendant; and the court, thereafter, April 4, 1904, made and filed findings of fact (*R.*, *9–23*) and conclusion of law that the petition of claimant be dismissed, and judgment dismissing the same was accordingly entered. The court, however, filed no opinion in the case (*R.*, *23*).

From that judgment claimant has appealed to this court (*R.*, *24*).

STATEMENT OF THE CASE.

1. Under date, December 22, 1898, defendant advertised for proposals for furnishing slaughtered *fresh* beef delivered in quarters to the United States troops stationed at posts and camps in the *interior* of the island of Cuba, for the period ending June 30, 1899, the beef to dress 400 pounds per carcass, and deliveries permitted of beef from spayed heifers:

> "Deliveries to be in such quantities, at such times, and in such places as the commissaries of the troops to be supplied shall designate. The numbers and locations of such troops are unknown at this time, and bids must be made upon this understanding" (*R.*, *5–6*, *Exhibits A and B*).

For several months prior to entering into the contract hereinafter referred to, claimant investigated the conditions existing on the island of Cuba; had ascertained that the ration of beef for a soldier in Cuba was one pound per man per day; and that from 25,000 to 30,000 soldiers, possibly more, would be quartered on the island; all of which matters were taken into account by him in computing his contract price (*R.*, *15*).

2. Pursuant to the advertisement aforesaid, claimant submitted proposal to furnish the beef embraced therein for 14½ cents per pound; and, being the lowest bidder, was awarded the contract at that price, (*R.*, *10*;) and formal contract, in writing, was entered into, dated January 4, 1899, covering the period January 5, 1899, to June 30, 1899, inclusive, "or such less time for any post as the Commissary General of Subsistence, U. S. Army, may direct" (*R.*, *7–8*, *Exhibit D*).

3. Prior to entering into that contract, and during the fall and early winter months of 1899, preparations had been made by the United States, (under the protocol of the treaty with Spain,) for taking possession of the island of Cuba, and a site had been selected at Quemados, some 8 or 9 miles distant from Havana, (the latter being the nearest *seacoast* point on the island to which the United States transports could go,) for the location of the main body of the United States troops in the vicinity of Havana (*R.*, *10–11*).

That post and camp, at Quemados, was maintained throughout the term of the Simpson contract, some 7,000 soldiers being quartered there at or about the beginning of his contract term, and additional troops sent there, numbering in all, at that post and camp, some 16,000 men in February, 1899, and about 10,000 in March, 1899. The post and camp were continued there until the final withdrawal of the volunteers from the island, which was subsequent to the expiration of the Simpson contract, July 1, 1899 (*R.*, *15*).

4. Prior to entering upon the performance of the contract, claimant, at considerable expense, made all necessary preparatory arrangements in the matter of securing cattle, engaging steamer space for their transportation, etc.; in addition to which he secured and employed agents upon the island of Cuba in the matter of making delivery of beef to defendant; and also, sent there an agent in that behalf from the United States, who, arriving there on January 10, 1899, reported to the chief and depot commissary, Lieut. Col. Smith, U. S. Army (*R.*, *15*).

5. Notwithstanding the contract with claimant, and the fact that Quemados was an *interior* post within the meaning of the language used in the contract (*R.*, *14*), defendant, through its chief commissary of the division of Cuba and depot commissary at the port of Havana, Smith, refused, at the very outset, to allow claimant to deliver beef at Quemados, where there were stationed at the beginning of the contract term about 7,000 soldiers; and defendant purchased from third parties, during the months of January and February (1899), being within claimant's contract term, native beef on the hoof for the use of said troops at Quemados (*R.*, *19*).

6. Claimant protested against this action, and, further, made and filed protests at Washington (*R.*, *19*), the same finally resulting in the acceptance by defendant of beef from claimant, covering the post or camp of Quemados during the period March 1 to 14, 1899, at his contract rate (*R.*, *15*).

7. Thereupon defendant's agent in Cuba having again refused to permit claimant to furnish beef at Quemados upon the ground that it was possible to purchase native beef at a lower price than that fixed in Simpson's contract, and claimant having again protested and appealed to the Secretary of

War at Washington, the latter, under date of May 4, 1899, decided—

(*a.*) That the camp at Quemados is an *interior* post within the meaning of the language used in the contract with Simpson, dated January 4, 1899.

(*b.*) That the claim of contract right to supply fresh beef to the troops stationed at said point is sustained.

In said decision, the Secretary called attention to a provision in the Simpson contract, wherein its duration was limited to June 30, 1899, inclusive, with this limitation: "or such less time for any post as the commissary general of subsistence, U. S. Army, may direct;" and it was accordingly suggested by the Secretary of War that the commissary general of subsistence might take such action under that provision of the contract as in his judgment the best interests of the Government require (*R., 14*).

8. Acting under that suggestion, the commissary general of subsistence, under date May 9, 1899, undertook to arbitrarily suspend all further deliveries by Simpson, under his contract, of beef at said *interior* post of Quemados, and, also, undertook to make the order of suspension retroactive so as to embrace the period from March 12, 1899, to the end of the contract term; although the court below, in finding the amount of loss of profit sustained by claimant by reason of this action, declined (impliedly) to give such retroactive effect to the order of suspension (*R., 14*).

9. Claimant was at all times, during the entire contract period, able, ready, and willing to furnish and supply the beef embraced therein, and protested against the action of defendant in ignoring his contract right (*R., 18*): the cost to him of supplying and delivering the beef at Quemados, under his said contract, was 10½ cents per pound; his contract price therefor was 14½ cents per pound; thus leaving him a profit of 4 cents per pound upon all beef delivered, or which, under his said contract, he was entitled to deliver at

said place, namely, a profit of 4 cents per pound upon 785,997½ pounds (*R.*, *15–16*).

If he had been allowed by defendant to furnish the beef at said place, he would have realized a profit of $31,439.90, treating the expiration of the contract as June 30, 1899, being the date of limitation specified in the contract itself; or $29,398.42, if the contract be deemed to have been legally terminated on May 9, 1899, the date of the communication from the commissary general, in which further deliveries of beef at that post by claimant were suspended, not because of any breach of contract or default in performance by claimant, but under the claimed and asserted arbitrary right in that behalf supposed to be found in that clause of the contract above referred to, and reading:

> "VI. This contract shall be in force from the 5th day of January, 1899, to the 30th day of June, 1899, inclusive, or such less time for any post as the commissary general of subsistence, U. S. Army, may direct" (*R.*, *14*).

10. The foregoing statement of facts covers, in brief, the *first* of the two claims sued on herein, and relates exclusively to the *interior* post or camp at *Quemados*.

11. In addition to the contract with claimant, for furnishing *fresh* beef, slaughtered, dressed, and delivered at posts and camps in the *interior* of the island of Cuba, defendant entered into contract with Swift & Co. for *refrigerated*, chilled, or frozen beef, slaughtered in the United States and delivered at points on the *seacoast* of the island; beef under the latter contract to dress 600 pounds per carcass, from fat steers (*R.*, *20–23*).

12. Prior to entering into contract with claimant, as above the latter inquired of the then United States commissary general, Charles P. Eagan, (by, through, and under whom

the contract was made,) to ascertain the exact extent and scope thereof, and was advised by him that it was the purpose and intent of the department to cover the *entire* beef supply for the island of Cuba by the two contracts aforesaid—Swift & Company, for *refrigerated* beef slaughtered in the United States and delivered at points on the *seacoast* of the island, and claimant (Simpson), for *fresh* beef, slaughtered, dressed, and delivered at posts and camps in the *interior* of the island; and that, when Swift & Company could not so furnish, claimant's contract covered the *entire* island, both *interior* and *seacoast* (*R.*, *15*).

13. During the contract period aforesaid defendant called upon claimant to furnish and supply beef at the following points on the *seacoast* of the island: Trinidad, Cienfuegos, Cardenas, Matanzas, Gibara, and Manzanillo (*R.*, *16–18*).

14. Notwithstanding the contract and agreement with claimant above referred to in respect of furnishing and supplying fresh beef, not only to such posts and camps as were situated in the *interior* of the island, but also throughout the *entire* island, and covering points on the *seacoast*, whenever Swift & Co. could not or did not furnish refrigerated beef under their contract; defendant purchased native beef, slaughtered on the island and used, with or without refrigeration, said purchases having been made from divers persons, including said Swift & Co. In making such purchases from Swift & Co., however, defendant waived the express provisions of the contract with that firm which required the beef to be slaughtered in the United States and delivered, refrigerated, chilled, or frozen, at points on the *seacoast*, as well, also, waived the contract provision as to said Swift & Co., that such beef should dress not less than 600 pounds to the carcass, the same to be from fat steers, etc. (*R.*, *16*).

15. The cities of Havana and Matanzas are *seacoast* points; and, in making the purchases referred to in the last preced-

ing paragraph, defendant paid therefor at the rate of ten cents per pound. It declined and refused to permit claimant to supply beef at those points, notwithstanding his ability, readiness and willingness to furnish and supply the same, and against his protest in being so ignored (*R., 18–19, 23*).

16. The amount of beef so purchased by defendant, and embraced in this the *second* and last item of the claim sued on herein, during the period aforesaid, and covering the cities of Havana and Matanzas, was 683,924 pounds. Claimant, under his contract, would have been entitled to receive therefor from defendant the sum of 14½ cents per pound, and could have realized a profit, had he been permitted to furnish and supply the beef at those two places, of 4 cents per pound the same aggregating, as found by the court below, the sum of $27,356.96 (*R., 19*).

17. All of the beef which was actually supplied by claimant and received by the United States from him has been duly paid for at his contract price (*R., 23*).

18. Claimant has not been paid any part of the amounts embraced in either of the claims hereinabove referred to, (*R., 14, 19*); and those two items of claim constitute the subject-matter of this appeal.

In discussing this case, the same may be conveniently considered under two heads, namely, beef supplied at the *interior* post and camp at Quemados, and beef supplied at the *seacoast* points of Havana and Matanzas.

BRIEF.

It may be remarked at the outset that the case now presented to this court for its consideration and determination is in somewhat the same legal situation as it was at the time of its argument and submission to the court below; save only that that court has found, in detail, the ultimate facts entering into the controversy, and has announced its conclusion of law that the petition of claimant be dismissed, and has entered its judgment dismissing the petition (*R.*, *23*).

That court, however, neither announced nor filed an opinion in the case; and so it is that counsel for claimant, as well also counsel for defendant, labor under the disadvantage of being unable to advise this court in respect of the reasons which, as matter of law, induced or are supposed to support and justify the judgment of the court below.

It is, therefore, not here possible to undertake either to meet or reply to what counsel for claimant may suppose or conjecture to have been controlling in the mind of the court below.

The consideration of the case in the brief will, therefore, be confined to the facts as found and the principles of law claimed to be properly applicable thereto; and therein replying to the objections raised in the court below in the oral and printed arguments submitted on behalf of defendant.

I.

QUEMADOS.

The facts in connection with the transactions between claimant and defendant covering the *interior* post and camp at *Quemados* have been above alluded to and briefly explained.

Before considering the application of the facts to the contract embraced in this suit, and in order to properly deter-

mine the questions here in issue, it may be useful to first consider the relative rights of the contracting parties.

It may be stated, preliminarily, that this contract is to be tested by precisely the same rules of law and governed by the same decisions as if the same had been entered into between individuals. No special privileges and rights are conferred by law in favor of the one party to such contract simply because that one party happens to be the Government.

This principle has been frequently affirmed:

For example, in the case of Gilbert (*1 C. Cls., 28, 37*) the court, speaking of the reciprocal rights and obligations in case of contracts between an individual and the Government, stated:

> "We see no good reason for adopting any different rule in regard to these contracts to which the United States is a party than is applied to those between man and man."

In the case of Curtis (*2 id., 144, 152*) the opinion states, as follows:

> "The rule and principle adopted by this court for the administration of justice between a claimant and the Government is simply to give that measure of relief which the law would award were the action between man and man. The court never gives greater and never gives discretionary relief . . . but the liability of the Government in these cases on contract, express or implied, has been held, generally, to be simply that which claimant might pursue against another defendant in another tribunal."

The same thing was reaffirmed in the case of Brooke (*id., 180–184*).

Again, in the case of The Southern Pacific R. R. Co. (*28 id., 77–105*), it is thus stated in the opinion:

> "We understand the law to be that 'when a government enters into a contract with an individual it

deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of a legislator for that of a moral agent, with the same rights and obligations as an individual' (3 Hamilton's Works, 518; U. S. *vs.* Bank of Metropolis, 15 Pet., 392; Deming *vs.* United States, 1 C. Cls. R., 191). If there are exceptions to the rule just stated, they do not apply to this action."

So, also, in the case of Starin (*31 id., 65, 85*) the court reaffirmed the same doctrine (citing Hall *vs.* Wisconsin, *103 U. S., 5*, and Davis *vs.* Gray, *16 Wall., 203*).

See, also, the same thing in the case of Smoot (*15 Wall., 36*), and particularly in Chicago and Northwestern Railway Co. *vs.* U. S. (*104 U. S., 680*).

Without further citation of authority it may be said to be settled beyond question, that the same principles must be applied in this case as would be applied had the contract here in suit been entered into between individuals.

Therefore the only right reserved to defendant, and upon which it may rely in respect of the enforcement, or attempted annulment, in whole or in part, of said contract, must be found in the contract itself or in the law governing the same.

Applying to the present contract, entered into between claimant and the Government, the same rules and principles in respect of the reciprocal rights and obligations of the contracting parties as obtain between individuals (and which, as above shown, is the true measure of relief in such cases), it must be apparent that the action of defendant in ignoring the contract rights of claimant was without the slightest justification.

By that contract said parties "mutually agreed" that claimant "shall deliver . . . at such posts and camps "as are situated in the *interior* of the island of Cuba . . . "such quantities of FRESH BEEF, . . . as from time to "time they may require" (*R., 7–8*).

This contract with claimant, covering *all* posts and camps situated in the *interior* of the island, was exclusive, and secured to him the right to furnish the same at the agreed contract price throughout the term of his contract, January 5, 1899, to June 30, 1899, inclusive.

In this connection, be it remembered, that the advertisement for proposals (and under which claimant bid) expressly set forth that the quantities of beef to be delivered, as well, also, the *numbers* and *locations* of troops, were then *unknown*, and that bids must be made upon that understanding (*R.*, *7–8.*) This uncertainty and indefiniteness as to both quantities and locations was made necessary by the uncertain conditions then existing; and the contract was, accordingly, and of necessity, entered into in the form so prescribed; the same being, however, certain, definite and fixed as to the *uniform* rate per pound for the beef agreed to be supplied in accordance therewith. The contract, however, became certain, definite, and fixed by the establishment, from time to time thereafter, of camps and posts in the *interior* of the island, and as to such *interior* points said contract was not severable.

Notwithstanding the express and unambiguous language employed in the contract, leaving no room for uncertainty or doubt as to the exact subject-matter thereof, and the rights and liabilities of each of the contracting parties, claimant's efforts to supply beef at Quemados, under his contract, met with opposition from the chief and depot commissary in Cuba from the very beginning.

On January 10, 1899, claimant was ready to furnish beef in Cuba, under his contract, and so notified and reported to said commissary, but without result. On January 26, 1899, he again demanded of said commissary that he be allowed to furnish the beef, there being at that time about 7,000 soldiers stationed at that post. The commissary refused to allow him to deliver. Claimant cabled protest to Washington, and filed written protest with said commissary; where-

upon the acting commissary general in Washington cabled reply to said commissary in Cuba, advising him that Simpson's contract embraced posts and camps in the interior of the island. During the remainder of the month of January, and during the month of February, said commissary in Cuba purchased and continued to purchase from third parties beef on the hoof, for the use of the troops at Quemados (*R., 12*).

In February, said commissary in Cuba entered into a written contract with a local dealer covering supply of beef at said post of Quemados. This brought about another protest from claimant; and, on February 19, 1899, the commissary general in Washington cabled the commissary in Cuba to call upon Simpson in future without further competition when refrigerated beef was not available. Thereupon, said commissary in Cuba called upon claimant to furnish beef, under his contract, at said post of Quemados, and which order was complied with and filled by claimant for a period of 14 days in March, and at his contract rate (*R., 13*).

On March 10, 1899, said local commissary cabled Washington that Swift & Co. could furnish beef, refrigerated in Cuba, which while not of the quality specified in the Swift & Co. contract, yet as good as the quality specified in claimant's contract; and he inquired whether he should accept the beef from Swift & Co., of the quality specified in Simpson's contract. That inquiry was answered by cable: "Quality being same, take Swift's. Price lower" (*R., 14*).

Thereupon, the local chief commissary ceased to take beef from claimant, at the post named, and accepted Cuban beef from Swift & Co., at a lower price than that which was agreed to be paid claimant; against all of which, claimant again protested (*R., 14*).

This brought about a consideration of the entire matter by the Secretary of War; and, on May 4, 1899, he rendered his decision (herein above referred to), to the effect that the camp at Quemados is an *interior* post within the meaning of the

Simpson contract, and that Simpson's *contract right* to supply fresh beef to the troops stationed at that point is *sustained* (*R.*, *14*).

Pausing here for a moment, it is to be remembered that defendant, in violation of claimant's contract, made purchases of beef for use at the *interior* post and camp of Quemados from divers local dealers, and finally permitted Swift & Co., (the latter having absolutely no contract in that behalf with defendant,) to oust claimant from a part of the territory covered by his contract, namely, Quemados.

That this action was absolutely without authority in law, defendant has expressly admitted, as has just been shown by the decision of the Secretary of War, and which decision, it is respectfully submitted, is the only one that properly could have been rendered in interpreting the meaning of a written agreement, the language employed in which is so absolutely unambiguous and free from all doubt.

The Secretary of War having thus sustained claimant's contract right to supply fresh beef to the troops stationed at Quemados, proceeded, nevertheless, to point out a way in which claimant might be thereafter *eliminated* from the situation, as follows:

> "3. The attention of the commissary department is directed to paragraph VI of said contract with Simpson, which reads as follows:
>
> "'VI. This contract shall be in force from the 5th day of January, 1899, to the 30th day of June, 1899, inclusive, or such less time for any post as the commissary general of subsistence, U. S. Army, may direct.'
>
> "4. The commissary general of subsistence is at liberty to take such action under this provision of the contract as in his judgment the best interests of the Government require" (*R.*, *14*).

The way having been thus pointed out, defendant, under date of May 9, 1899, undertook to make the suspension of deliveries of fresh beef, as per the notification of March 12,

1899 (*supra*), cover the remainder of the contract term, so far as it covered said post at Quemados (*R., 14*).

There is no pretense made by defendant that said *interior* post at Quemados was abandoned, or that the troops had been removed therefrom during any part of claimant's said contract term, and the supply of beef at said post by others than claimant continued to the end of his said contract term (*R., 14–16*).

It is utterly inconsistent with and repugnant to the contract theory in general, and with this contract in particular, where both parties solemnly "mutually agreed," the one to furnish and supply, and the other to accept and pay for, fresh beef "at such posts and camps as are situated in the *interior* of the island of Cuba," that any such unilateral right and privilege as that asserted by defendant in this case should exist.

Such contention, if sustained, would logically lead to the result that claimant was absolutely bound to supply fresh beef to *every* interior post and camp on the island, while defendant reserved to itself the unusual and extraordinary (but *exclusive*) privilege of either accepting or declining such beef at any *particular* interior post or camp, accordingly as it might or might not be able to make more favorable terms with other dealers during said contract term.

This is certainly not the law; it was not so stipulated in the contract, nor was it in contemplation of either of the contracting parties.

That said paragraph VI of the contract was intended to reserve no such *arbitrary* right and privilege to defendant is abundantly shown by the terms of the contract itself, and by the conduct of the parties.

In order to a proper understanding of the true meaning of the reservation contained in said paragraph VI, it is proper to bear in mind that the subject-matter of this contract was, in its scope, quite different from the ordinary contract, covering the beef supply at a specific army post: Here

it was not definitely known, at the time claimant's contract was entered into, just where the various United States troops would be located on the island of Cuba, nor the numbers of such troops when so located. Had the exact *location* of the various troops, camps, and posts been thoroughly known and decided upon, there would have been no difficulty in making the contract cover, specifically, certain named posts. As it was, not only was the question of *location* of the various posts not known, but it was, likewise, equally uncertain as to the *duration* of the occupation of any particular post or camp that might be established. This being so, the Government prepared this contract in a form which would secure to it its *entire* fresh-beef supply for such posts and camps as then were or might thereafter be situated in the *interior* of the island, reserving to itself the right to terminate such supply of beef at any particular *interior* post or camp, in the event the same might be thereafter abandoned by the Government and the troops moved away during the term of the contract.

This is the only fair and reasonable interpretation to be put upon said paragraph VI, and that interpretation is one which not only does no violence to the language employed, but secures to each of the contracting parties the rights and obligations of the contract. The reservation was not intended to secure to the Government the right to *arbitrarily* deprive claimant of his contract at any particular post, simply to secure a pecuniary benefit to the United States by obtaining beef from others at a lower price than that fixed by the contract; nor has such reservation ever been so interpreted (aside from the action in this case), so far as counsel have been able to discover, as authorizing its use for any such purpose.

In the printed brief, as well also in the oral argument, on behalf of defendant, in the court below, it was contended that the claim for damages for loss of profit upon beef at the *interior* post and camp at Quemados could not be sustained,

because of the following provisions, found in paragraph 1 of the contract:

> "1. The said party of the second part shall deliver to the commissaries of the United States troops stationed at such posts and camps as are situated in the interior of the island of Cuba, at such prescribed hours on such days as, under the direction of their commanding officers they shall designate, such quantities of fresh beef, slaughtered, dressed and delivered in quarters, good in quality and condition, fit for immediate use, and from fore and hind quarter meats proportionally, including all the best cuts thereof, as from time to time they may require" (*R.*, 7).

In connection with that contract provision, it was contended on behalf of defendant that the *designation* and *requirement* referred to the commissaries in Cuba, and that without both designation and requirement by such commissaries, the contract right to deliver beef at any particular *interior* post and camp did not and could not accrue to claimant.

The exact intent and meaning of the agreement entered into between the parties is made so exceedingly specific and clear by the advertisement for proposals and the written contract based thereon, that there is here no necessity for conjecture or doubt.

The advertisement requested proposals for furnishing slaughtered fresh beef to the United States troops stationed at the posts and camps in the *interior* of the island of Cuba, for a specified period; but, it was added, the numbers and locations of the troops were, at that time, unknown, and that all bids must be submitted upon and with that understanding (*R*, 5).

The contract which followed as the result of that advertisement for proposals was worded in like language; thus making the contract applicable to the *entire* fresh beef supply for all posts and camps as then were or might thereafter be situated in the *interior* of the island, the quantities of

beef to be measured by the requirement (need) of the troops stationed at any such camp and post. Such contract provision did not in any sense contemplate or mean the arbitrary discretion or pleasure of any individual commissary; it did contemplate and mean that upon the establishment and location of any *interior* post and camp, claimant was under obligation to furnish, and he had the contract right to furnish, such quantities of beef as the need of the troops there stationed required (not merely the pleasure of the commissary at such post).

It was urged below that, in this case, so far as Quemados is concerned, there was neither designation nor requirement by the commissary; and that, therefore, claimant's contract right never really attached at that interior post.

That argument, however, is utterly untenable, and moreover it is not sustained by the findings of fact in this case.

It has already been pointed out, and the court below has so found, that the Secretary of War decided that Quemados was an *interior* post and camp *within the meaning of the language used in Simpson's contract*, and that his claim of contract right to supply fresh beef at that post was *sustained* (*R.*, *14*), and, furthermore, the commissary in Cuba did, in fact, *designate* Quemados as a post and camp to be supplied by claimant with fresh beef under his contract; and he did so supply it during a period of fourteen days in March, after which time, however, further deliveries by him at that post were suspended by said local commissary, simply and only because defendant found it possible (and profitable) to obtain native beef from other dealers at a lower price than claimant's contract rate.

In considering this objection, so urged below by defendant, it may be useful to first consider the authorities cited in supposed support of the objection:

In the Lobenstein case (*91 U. S., 324*), claimant had two contracts with the United States, under one of which he was

entitled to all the hides of beef cattle, at a certain place, and during a specified period, "which the superintendent of In-"dian affairs at that place shall decide are not required for "the comfort of the Indians; the number of hides to be "about 2,000, more or less;" the other contract was similar in its terms, and contained like provision for the hides of cattle slaughtered for Indians at another designated place, the number there being named as about 4,000, more or less. The Commissioner of Indian Affairs directed that *all* the cattle should be turned over on foot to the Indian agent; and this was done. They were all given out from time to time to the Indians, by whom they were killed; and, consequently, no hides could be delivered under the contract. This court there held that the determination of the requirement of hides for the comfort of the Indians was, under the contract, lodged in the superintendent of Indian affairs; and that if he decided that *all* thereof were so required by the Indians, that excused the United States from delivering to Lobenstein; and it was held, that the superintendent did, in effect, so decide.

In the Brawley case (*96 U. S., 168*) the contract required the delivery of a named quantity of oak wood "more or less, as shall be determined to be necessary by the post commander for the regular supply," at a designated army post. After supplying but a small part of the quantity named in the contract, the post commander, (within four days of the date of the formal contract,) notified Brawley that no more of the wood would be required; and the Court of Claims found, as a fact, that that post did not need (require) more than the quantity of wood so actually accepted from claimant.

This court held that the actual requirement of the Government, (*i. e.*, its need,) at said army post, (in the absence of bad faith,) measured and determined claimant's contract right, this because of the phraseology of the contract.

In the Kihlberg case, (*97 U. S. 398*), which involved a contract for the transportation of certain stores of the United States between designated points, it was provided that the distance of the transportation should be "ascertained and fixed by the chief quartermaster." The distance, as so ascertained and fixed by the chief quartermaster, was less than by air line, or by the usual and customary route; the difference, however, between his estimate of distances and those by air line, or by the road usually traveled, was not so material as to justify the inference that the chief quartermaster did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. That being so, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his determination in the premises was held to be conclusive upon both parties, and not subject to the revisory power of the courts; this, however, because of the plain terms of the contract.

So too, in the case of Gleason (*175 U. S., 588*), where the contract authorized an extension or extensions of time, in respect of the performance of the contract work, the same being made dependent, however, upon the judgment of the engineer in charge when applied to to grant such extension; it was held that his judgment was not subject to the revisory power of the courts, except upon allegation and proof of bad faith, or of mistake and negligence so gross as to justify the inference of bad faith—neither of which elements, however, were alleged or proved.

The same principle was also involved in two other cases cited below on behalf of defendant, but which need not here be specially commented upon, namely, Railroad Co. *vs.* March, (*114 U. S., 549*), and Railroad Co. *vs.* Price (*138 U. S., 185*).

It is respectfully submitted that none of the cases just referred to have any useful or controlling bearing upon the question involved in the present contract, and now being

considered, the rights and liabilities under which contract must necessarily be measured and determined by the particular facts of this case.

By the plain terms of the contract the designation by the commissaries *at* the posts was merely as to the hours and days for delivery. The scope of the contract was not to be enlarged or contracted by them nor by the direction of their commanding officers—the amount of beef to be delivered was what was required by the troops, and the places for delivery were posts and stations situated in the interior. It was the province of the Commanding General of the Army or the Secretary of War by special orders to locate the posts and camps, and fix the number of troops at each, and by general order as embodied in the regulations (Ed. of 1895, par. 1253) a pound and a quarter was fixed as the amount of fresh beef for each soldier. The commissaries had no control over either of these factors, but the failure of the commissary to designate the hours and days for the delivery of the articles claimant had contracted to furnish constitutes the very breach of contract which inflicted the injury.

The official designation of the advertisement for proposals was thus: "Subject: Beef for interior points in Cuba." The body of the advertisement itself, in unmistakable language, referred to the supply of fresh beef for the "United States troops stationed at posts and camps in the interior of the island of Cuba" (*R.*, *5*).

The language of claimant's proposal and bid was equally clear: "I will furnish beef for the United States troops at posts in the interior of Cuba at 14½c. per pound" (*R.*, *6*).

The contract itself contemplated and in explicit terms expressed the same subject-matter, namely, beef for interior posts and camps in Cuba (*R.*, *7*).

It would seem quite out of the question to now contend that, at last, the entire contract became subject to the mere pleasure of the commissary of troops at any particular *interior* post and camp, who might require or not require de-

liveries of beef by claimant accordingly as he willed, and thus render the contract entirely optional with such commissary; and this notwithstanding the presence of troops at such interior post.

Given the location and establishment of an interior post and camp, and the presence there of United States troops, it was the requirement (need) of the latter, not of the commissary, that measured and determined the contract right of claimant.

The commissary of troops did not and could not locate the posts and camps, nor could he fix the number of such troops, nor the amount of the soldiers' ration, in short, the *requirement* of the troops as to quantities of beef; all of those elements were otherwise, and by other and higher authority, fixed and determined. Having been so fixed and determined, claimant's contract right attached, and, thereupon, it became the duty of the commissary of such troops to notify claimant, not what beef he, the commissary, required, but what the given number of troops required, and therein to specify the quantities as so ascertained and fixed, and to prescribe the hours and days of the deliveries.

The failure of the commissary of troops to so designate either quantities, or hours and days for the delivery of the beef claimant had contracted to furnish, not only did not prevent claimant's contract right attaching, but would of itself constitute a breach of the contract by defendant.

If this be not so, then the contract imposed no obligation upon the Government, except in so far as it might, from time to time, meet the pleasure of a local commissary of troops in Cuba, or be deemed profitable to permit and require claimant to deliver at any particular post and camp.

It is quite evident that defendant permitted claimant to supply beef under his contract at many interior points on the island, and where it, perhaps, found it convenient and profitable to allow him so to do; but at this particular post

and camp, Quemados, lower rates were obtained from other dealers, and so claimant's contract right was there ignored.

Having referred to the cases so relied upon below by defendant, and having again called attention to some of the controlling facts in this case, bearing upon the question here being considered, it may be useful to consider other decided cases, both State and Federal, in which the question has been considered:

For example, Railroad Co. *vs.* Detroit (*64 Mich., 360*), petition alleged that land was "required for public use;" held, equivalent to "necessary for public use."

In McKeever *vs.* Iron Co. (*138 Pa. St., 184*), the words "you may require" were held equivalent to "you may need."

In Minnesota Lumber Co. *vs.* White-breast Coal Co. (*160 Ill., 85*), the defendant, lumber company, contracted to purchase of plaintiff, coal company, its "requirements" of coal for a certain season, and plaintiff was to furnish the same at a certain rate per ton. Held, that the contract was not void for uncertainty or want of mutuality; but that it evidently meant to call for the amount of coal which the company should *need* in its business for such season, and not merely what it might *choose* to require of the other party.

In Wolff *vs.* Wells, Fargo Co. (*115 F. R., 39, C. C. A.*) the words were "what you may require." Throughout the opinion, the word "require" was used in the sense of "need." Defendant was "notified of the amount required."

Also, in the case of Crane *vs.* Crane & Co. (*105 F. R., 869*) the opinion of the court refers to that class of contracts wherein, because of the exigencies of the situation, it is not always possible to definitely state quantities and amounts, and adds:

> "It is within legal competency for one to bind himself to furnish another with such supplies as may be

> needed during some certain period for some certain business or manufacture. . . . Reasonable provision in business requires that such contracts, though more or less indefinite, should be upheld. Thus a foundry may purchase all the coal needed for the season; or a furnace company its requirements in the way of iron; or a hotel its necessary supply of ice." (Citing cases.)

In Fertilizer Co. vs. Phosphate Co. (*121 F. R. 298 C. C. A.*) the former agreed to buy from the latter, for a period of five years, its entire consumption of phosphate rock, at a fixed price, and the other party agreed to supply the same as ordered; it being stipulated that the quantity used by the buyer was understood normally to amount to 1,500 tons a year, but that it should have the right to demand as much as 3,000 tons. The vendee, for more than a year during the term of the contract, ordered no rock, but made substitute purchases from other manufacturers, because then more profitable. At the end of that time, however, the price of rock having materially increased, it ordered the maximum of 3,000 tons for the ensuing year, under the contract. It was held, that the contract imposed upon both parties an obligation to perform, and that the action of the purchaser in so ignoring, for part of the contract period, the contract obligation to purchase, simply because then more profitable, and thereafter, when it was more profitable to purchase under the contract, resuming its purchases thereunder, constituted a substantial breach.

In the Mueller case, (*19 Ct. Cl. 581,*) the decision of the court is thus accurately stated in the syllabus:

> "The word 'required' which occurs frequently in Government contracts may relate to the wants of the service, or to the unsettled purpose of the Government. Where the provision is to furnish stone '*at such times and in such quantities as may be required,*' the word must be construed to refer to the wants of the service."

The judgment in that case was affirmed by this court, (*113 U. S. 153*;) that the word "require" could mean the request of a local officer, irrespective of the needs (varying or fixed) of the Government, was not suggested.

That contracts with the Government containing provisions for variation in quantities are binding alike upon both parties has been recently again considered and decided by this court, in the case of Moore (*196 U. S., 157*), the opinion wherein, while not here strictly analogous in its facts or the principles involved, may be here quoted from, as follows:

> "In engagements to furnish goods to a certain amount, the quantity specified governs. Words like 'about' and 'more or less' are only for the purpose of providing against accidental and not material variations.
>
> "Under the contract in this case for delivery of 'about' 5,000 tons of coal, the United States cannot refuse to accept more than 4,634 tons, but is liable for the difference in value on 366 tons tendered and acceptance refused."

The determinative point in the case at bar, as fixed by the contract itself, was the establishment and location of the interior post and camp, and the number of troops; those matters were determined by the commanding officer. The local commissaries had no discretion; they could only inform the contractors of the decrees of the commander, and specify the hours and days of the deliveries.

That beef was required by the United States troops stationed at said interior post and camp at Quemados, during the entire term of the Simpson contract, has already been shown; and that requirement, as found by the court below, aggregated 785,997½ pounds of beef, all of which was purchased by defendant from others than claimant, and during his contract term (*R., 16*).

Defendant, however, seeks to interpret the word "require" as synonymous with "request," but this fails unless there

be added the words, "as they may request of the party of the second part." It is certain that all the beef for which this suit is brought was "requested" by the various commissaries. It was not requested of claimant, and therein lies the breach of the contract. Unless the United States may introduce new words to radically change the plain language, claimant was entitled to furnish all the beef at the interior points which they, the troops, required—that is to say, *needed*, or which the commissaries requested any one to furnish for such use.

Without further pursuing this branch of the case, it is respectfully submitted that claimant's contract right to supply fresh beef to the United States troops stationed at the *interior* post and camp of Quemados, on the island of Cuba, during the *entire* contract term, to wit, January 5, 1899, to June 30, 1899, inclusive, should be sustained, and that judgment should be entered in his favor covering the amount of profit on the quantities of beef purchased by defendant from dealers other than claimant, during said period, and which profit he could have made had he been permitted to supply same, and to which profit he was entitled, namely, the sum of $31,439.90 (*R.*, *14*).

2.

HAVANA AND MATANZAS.

Passing now from the question as to the contract right of claimant to supply beef at Quemados, the attention of the court is respectfully asked to the remaining branch of the claim set forth in the petition herein, covering the claim of right on the part of claimant to supply beef to defendant at the cities of Havana and at Matanzas (being points on the *seacoast* of Cuba) when Swift & Co., under their contract, did not supply the same.

While, as hereinabove stated, the contract with Swift & Co. covered refrigerated, chilled, or frozen beef, slaughtered

in the United States, and delivered in bulk, "at points on the *seacoast* of the island" (*R., 20*), and the contract with claimant, Simpson, covered fresh beef, delivered "at such posts and camps as are situated in the *interior* of the island" (*R., 7*), it was, nevertheless, the purpose and intention of the Government to cover the *entire* beef supply of the island of Cuba by the two contracts, the one being supplementary to the other (*R., 15*).

Prior to entering into said contract and for the purpose of ascertaining its exact purpose and scope, claimant inquired of the then Commissary General of Subsistence in regard thereto, and was by him informed that when Swift & Co. could not furnish refrigerated beef at the seacoast, under their contract, claimant's contract covered the *entire* island (*R., 15*).

That this was the true understanding and agreement between the contracting parties cannot be successfully controverted, even though the terms of the contract itself, literally construed, might not embrace any territory on the island not included within the designation or description *interior* "posts and camps."

Before examining the construction put upon the terms of the agreement and contract by the parties thereto, as shown by their conduct, the attention of the court is invited to the rule of decision in such cases laid down by this court in the case of District of Columbia *vs.* Gallaher, affirmed on appeal by the Supreme Court of the United States (*124 U. S., 505*), where it was thus stated:

> "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract."

And see also the following cases:

Raub *vs.* Barbour (*6 Mackey, D. C., 245*);
Mason *vs.* Spaulding (*18 D. C., 115*);
C. & O. Canal Co *vs.* Hill (*15 Wall., 94*);
Ware *vs.* Allen (*128 U. S., 590*).

That the Government *intended* claimant's contract to cover not only *interior* posts and camps, but also points on the *seacoast*, whenever Swift & Co., under their contract, could or did not supply the same, and that claimant understood that he was obliged so to do, is abundantly shown by the conduct of the contracting parties.

For example, the following points on the *seacoast* of the island were supplied by claimant under his contract, some during a part of his contract term and others during the entire term thereof: *Trinidad, Cienfuegos, Cardenas, Matanzas, Habana, Manzanillo, Santiago de Cuba*, and *Gibara* (*R. 16–18*).

The orders to claimant in respect thereof were professedly based upon claimant's *contract*.

Take, for example, the following order to claimant from the chief and depot commissary, dated January 18, 1899, covering, among others, points on the *seacoast* named:

> "I have to inform you that I have this day notified, by wire, the commissaries at the following points to call on you for fresh beef, *under your contract*, from and after date set opposite each:
>
> * * * * * * *
>
> "*Trinidad*, January 23, 1899.
>
> * * * * * * *
>
> "*Cienfuegos*, January 21, 1899."
>
> (*R., 16–17.*)

And, again, similar order, under date of January 25, 1899:

> "In accordance with your verbal request of today, I have to advise you that the following points are to be supplied by you *under your contract:*
>
> * * * * * * *
>
> "*Trinidad.*
> "And until Swift & Co. are prepared to furnish:
> "*Cienfuegos.*
> "*Cardenas.*"
>
> (*R., 17.*)

These orders were not mere matters of favor, but were intended to be, were in fact, and were described as being, *under claimant's contract* (*R., 17*).

The *first* contract of Swift & Co. expired by limitation, December 31, 1898; and that contract covered, as has already been shown, beef slaughtered and refrigerated in the United States, and to be delivered at points on the *seacoast* of Cuba. The subsequent and *second* contract between defendant and Swift & Co., (covering the same subject-matter,) was not entered into until February 23, 1899. During said intervening period, there was no existing contract with Swift & Co. (*R. 16*).

Intermediate said two dates, as well also subsequent to the date of said second contract with Swift & Co., defendant purchased, from others than claimant, (but against his protest,) beef slaughtered in Cuba, and used, with or without refrigeration, at the cities of Havana and Matanzas, Cuba, from January 1 to June 30, 1899, covering the term of claimant's contract, aggregating 683,924 pounds (*R. 16*).

Defendant not only purchased native beef, slaughtered on the island, and from dealers other than claimant, but it also purchased from Swift & Co. large quantities of native beef slaughtered on the island and there refrigerated, and this absolutely without contract (*R. 16*).

The court below has expressly found that it was the purpose and intention of defendant, and so communicated to claimant, to cover the *entire* beef supply in Cuba, both *interior* and *seacoast*, by the two contracts, Swift & Co. and Simpson; and that when the former did not or could not supply the beef, the latter should (*R., 15*).

That this was the real agreement of the parties is further evidenced by the official correspondence relating to that matter:

On February 18, 1899, Major A. L. Smith telegraphed from Havana:

> "Please inform me if Simpson should in future be called upon without further competition to supply

beef here and elsewhere in Cuba when refrigerated beef is not available. Immediate decision urgently needed" (*R., 17*).

The answer of Acting Commissary General Davis, February 19, 1899, was:

"Call upon Simpson in future without further competition when refrigerated beef is not available" (*R., 17*).

On February 20, 1899, Major A. L. Smith telegraphed to the commissaries at Matanzas, Pinar del Rio, Guanajay, Cienfuegos, Trinidad, Sancti Spiritus, Nuevitas, Puerto Principe, Gibara, and Manzanillo, as follows:

"Under authority of telegram of the Commissary General of 19th instant, you are directed to call in future on Simpson for fresh beef, without further competition, when refrigerated beef is not available" (*R., 18*).

Of these Matanzas, Cienfuegos, Trinidad, Gibara, and Manzanillo were on the coast (*R., 18*).

Thereafter, Colonel Smith wrote as follows:

"HEADQUARTERS DIVISION OF CUBA,
"OFFICE CHIEF COMMISSARY,
"HAVANA, *February* 21, 1899.

"Mr. G. W. SIMPSON,
"(*c/o J. F. Berndes und Co.*),
"64 *Cuba, Havana.*

"SIR: I have to advise you that, acting under instructions contained in telegram of the Commissary General of the 19th instant, I have instructed commissaries throughout the island to call upon you to furnish fresh beef under your contract whenever Swift and Co. cannot deliver fresh beef (refrigerated) under their contract.

"Respectfully, A. L. SMITH,
"*Lt. Colonel, C. S., U. S. Army,*
"*Chief and Depot Commissary.*" (*R., 18.*)

Nevertheless, defendant made the purchases of beef for the supply needed at the two points named, from divers persons, including Swift & Co.; and, in its purchases from Swift & Co. defendant waived the express contract provisions entered into with that firm, which contract required, as follows:

> "1. Refrigerated, frozen, or chilled beef, from fat steers, slaughtered in the United States, and delivered at points on the *seacoast* of the island.
> "2. Beef to dress 600 pounds to the carcass" (*R., 21*).

Those requirements and standards were so modified and changed by defendant as to permit Swift & Co. to furnish:

> "1. Native beef, slaughtered on the island, and refrigerated there, or used without refrigeration.
> "2. Beef to dress 400 pounds to the carcass; and allowing delivery of beef from spayed heifers" (*R., 13–14; 18–19*).

This change in requirements and standards at once gave Swift & Co., without any contract in that behalf, the benefit of the more favorable terms secured by claimant, Simpson.

The sole excuse and attempted justification for said *unauthorized* action is found in the telegram sent by defendant to said chief and depot commissary at Havana, March 11, 1899:

> "Quality being same, take Swift's. Price lower" (*R., 14*).

In this brief telegram is to be found the defendant's theory of the rights of claimant as applied by it to his contract, from the beginning to the end: "Quality being the same, *and price lower*," ignore claimant and buy from others; "*price higher*," require claimant to furnish *under his contract*.

This measure of claimant's contract rights, as applied by defendant, is so clearly shown in the record that the conclusion is irresistible that defendant treated claimant as being

under contract obligation to supply the fresh beef for Cuba whenever and wherever, *interior* or *seacoast*, it resulted in pecuniary benefit to the Government. While such course of action may be praiseworthy from a purely economical standpoint, it is not in accordance with the fundamental theory of contract obligations and rights.

The court below has found that claimant could have derived a profit at said two places, had he been permitted to make deliveries of beef, the same amounting to $27,356.96, no part of which, however, has been paid him.

3.

CONCLUSION.

Without further prolonging the argument in the printed brief, it is respectfully submitted that the judgment of the court below, dismissing claimant's petition, should be *reversed*, and that judgment should be directed to be entered herein in favor of claimant and against the United States for the respective amounts claimed by him, as set forth and found by the court below in its findings of fact.

Respectfully submitted,

JOHN S. BLAIR,
A. A. HOEHLING, JR.,
Attorneys for Appellant.

WASHINGTON, D. C., *October* 11, 1905.

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No. 31.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

GREENLIEF W. SIMPSON, APPELLANT,

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THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

LOUIS A. PRADT,
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Special Assistant Attorney.

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BRIEF FOR THE UNITED STATES.

STATEMENT.

On January 4, 1899, the United States, by and through Gen. Charles B. Eagan, Commissary-General of Subsistence, U. S. Army, entered into a contract with the appellant, whereby it was agreed that he should deliver "to the commissaries of the United States troops stationed at such posts and camps as are situated in the *interior* of the island of Cuba, at such prescribed hours on such days as, under the direction of their commanding officer they shall designate, such quantities of fresh beef * * * as from time to time they may require." (Rec., p. 7.)

It was further provided that—

> VI. This contract shall be in force from the 5th day of January, 1899, to the 30th day of June, 1899, inclusive, *or such less time for any post* as the Commissary-General of Subsistence, United States Army, may direct. (Rec., p. 8.)

During the period covered by the contract there were subsisting contracts between the United States and Swift & Co., of Chicago, Ill., whereby Swift & Co. agreed to "furnish the United States for the use of the Army of the United States such quantities of refrigerated, chilled, or frozen beef in bulk *delivered at points on the seacoast of the island of Cuba* occupied by the Army of the United States as shall from time to time be called for by the Acting Commissary-General of Subsistence of the United States Army." (Rec., pp. 10, 20.)

These contracts with Swift & Co. further provided that said company should erect refrigerating buildings "as near the point of transfer as the commanding general may designate, at which ships carrying the refrigerated meats shall land for the discharge of said shipments." (Rec., p. 21.)

Also that the United States should furnish army transports for the purpose of carrying the refrigerated beef from the United States to Cuba. (Rec., p. 20.)

In the month of December, 1898, a refrigerating building and apparatus was located at Los Quemados, a point about 7 miles from the city of Habana, by Swift & Co., in accordance with the provisions of the contract above referred to, and was completed and

ready for the reception of beef about the 1st of January, 1899. (Rec. p. 11.)

It so happened in the course of events, that the United States was not at all times able to furnish transportation for refrigerated beef ordered from Swift & Co. Consequently, there occurred periods during the winter and spring of 1899 when the supply of refrigerated beef at Habana or Los Quemados failed. At such times the chief commissary officer at Habana went into the market and purchased beef freshly slaughtered on the island of Cuba for issue to the troops. The appellant, on January 26, 1899, protested to the chief commissary and also to the Commissary-General at Washington against the purchase of beef for issue to the troops on the island of Cuba from persons other than himself and Swift & Co., it being contended by said appellant, then as now, that the two contracts, the one with appellant and the one with Swift & Co., were intended to provide for the furnishing of all the beef used by the United States troops on the island of Cuba.

As the result of appellant's protest and the negotiations and correspondence which followed with reference thereto, the appellant was, on February 21, 1899, informed that thereafter he would be called upon to furnish fresh beef under his contract whenever Swift & Co. were unable to furnish fresh beef under their contract.

Under this arrangement, appellant furnished beef at Los Quemados during the first thirteen or fourteen days of March, 1899, and was paid therefor the price named in his contract.

At about this time a member of the corporation of Swift & Co. appeared in Habana, and upon discovering that freshly slaughtered beef was being furnished at Los Quemados, which was, for the purposes of the contract between the United States and Swift & Co., a *seacoast point*, entered a protest with the chief commissary of the United States at Habana, and asked to be permitted to furnish freshly slaughtered but chilled and frozen beef for issue to the troops at Los Quemados and adjacent points, insisting and contending that the failure of the supply of refrigerated beef for issue at said point was due to the inability of the United States to furnish transportation from the United States to the island of Cuba, and that in all fairness and justice the United States should permit Swift & Co. to substitute beef freshly slaughtered on the island of Cuba, but chilled or frozen in their refrigerator plant at Los Quemados, in lieu of refrigerated beef from the United States, whenever and so long as transportation for refrigerated beef failed. After due consideration of this protest and proposition of Swift & Co., it was decided to discontinue the acceptance of beef from the appellant for issue from Los Quemados from and after March 14, 1899, and the appellant was notified in writing of such decision. Thereafter until the 30th day of June, 1899, and even subsequent thereto, a considerable quantity of beef freshly slaughtered on the island of Cuba and chilled or refrigerated in the plant at Los Quemados was furnished by Swift & Co. (See Finding X, Rec., pp. 12, 13, and 14.)

In passing it is proper to state that the statement in finding 9 (p. 11): "But the refrigerator (meaning the refrigerator at Los Quemados) was never used by the commissary or by Swift & Co. as a storage for beef slaughtered and dressed in the United States and brought to Cuba by Swift & Co. under their contract with the defendants," is erroneous. The finding quoted is not important and has no apparent bearing upon the issue involved in this case; however, it seems proper to say that a case is pending in the Court of Claims by Swift & Co. for alleged balances due for refrigerated beef received at Habana and stored in said refrigerating plant during the period referred to, and it is proper further to state that the reports of the War Department and the testimony taken in said case leave no doubt that at least two cargoes of beef and other fresh meat were received and stored in said refrigerator during said period. The two cargoes which were actually received are referred to by the appellant in his telegram of February 11, 1899, a copy of which is set out in finding 10 (Rec., p. 13).

The plaintiff's claim embraced profits upon all beef furnished at Los Quemados by others than himself from January 10, 1899, to June 30, 1899, which profits the court found would have been $31,439.30; or, if claimant's contract was lawfully annulled May 19, 1899, that the amount would be $29,398.42. It also embraced a claim for profits upon beef other than refrigerated beef shipped from the United States furnished to the posts of Habana and Matanzas by others

than the claimant, which profits the court found would have aggregated the sum of $27,356.96.

The court found against the entire claim, dismissing the petition. From that decision the claimant took this appeal.

ARGUMENT.

The claim of appellant was rested in the Court of Claims, as it is here, upon two propositions: First, the general contention that under his contract the claimant was entitled to supply, for the use of the United States troops in the island of Cuba, all the fresh beef needed by them except such refrigerated beef shipped from the United States as might be supplied by Swift & Co., under their contract, for the use of the troops at seacoast points. This proposition covers the claim for fresh-slaughtered beef furnished to the seacoast points of Habana and Matanzas by others than the claimant and refrigerated beef furnished by Swift & Co. to the same points, but from animals slaughtered by them upon the island.

The second proposition is that, as to Los Quemados, it was a post or camp situated in the interior of the island, and therefore, under his contract, the claimant was entitled to furnish, for the use of the troops there stationed, all of the fresh beef required for their use; and that not only the purchase of fresh slaughtered beef for the use of said troops from others than himself, but also the purchase of refrigerated beef from Swift & Co. for use at said point, was a violation of his contract. Both of these propositions relate to the claim for beef supplied at Los Quemados by others than the claimant.

The Court of Claims did not seem to consider that these propositions deserved discussion, but dismissed the petition without filing an opinion. This action, we contend, was just and well founded.

THE CLAIMANT'S FIRST PROPOSITION.

Counsel for appellant do not contend in support of their first proposition that there is anything in the language of the claimant's contract to bear out the same, but that in the light of the contracts of the Government with Swift & Co. and other surrounding circumstances such was the intent and purpose of the claimant's contract; that is to say, stated with precision, the proposition is: That the provision in claimant's contract, *that he should deliver to the commissaries of the United States troops stationed at posts and camps in the interior of Cuba, at such times as said commissaries should designate, such quantities of fresh beef, fit for immediate use, as said commissaries might from time to time require*, should be held to have the same force and effect as though it read *that the claimant should deliver all fresh beef needed for the use of the United States troops in the island of Cuba, whether stationed at interior or seacoast points, except such refrigerated beef shipped from the United States as might be supplied by Swift & Co. under their contracts with the United States for the use of troops at seacoast points only.* This is enlargement with a vengeance. This is making the cloud "backed like a camel" to look "very like a whale," without winking.

It does not seem to be a proposition capable of any serious discussion, and indeed counsel for appellant

have attempted none, but practically rest it upon the facts that Commissary-General Eagan informed the claimant prior to entering into the contract that such was the purpose and intent of the War Department; that the claimant was allowed at various times by the Commissary-General to supply various seacoast points with fresh beef, and that Commissary Smith, in notifying claimant of the order to this effect, used the language "under your contract;" also upon the language of the contracts with Swift & Co. To be sure it is stated in appellant's brief on page 29 that—

> The court below has expressly found that it was the purpose and intention of defendant, and so communicated to claimant, to cover the *entire* beef supply in Cuba, both *interior* and *seacoast*, by the two contracts, Swift & Co. and Simpson, and that when the former did not or could not supply the beef, the latter should. (Rec., p. 15.)

But this assertion proceeds from either misapprehension or inadvertence, for, by reference to finding 12, it will be seen that the court makes no such finding, but merely finds that, as above stated, Commissary-General Egan so stated to the claimant prior to entering into his contract. But the obvious answer to this is that though this may have been Commissary-General Egan's clear understanding and purpose before entering into the contract with the claimant, certainly both he and the claimant failed utterly to put into the contract any apt language giving expression to such purpose. On the contrary, they selected language explic-

itly confining the operations of the contract to fresh beef required by the various commissaries to be delivered to army posts or camps situated in the *interior* of the island. The contract being thus made, the claimant must stand by it as made.

> The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court can not be governed by any such outside considerations. (Brawley *v.* U. S., 96 U. S., 173; quoted with approval by Mr. Justice White in Simpson *v.* U. S., 172 U. S., 379.)

The only admissible rule of interpretation is for the court to gather the intent of the parties *from the words actually used in the contract* interpreted according to their plain and usual significance; and it is not permissible for the courts to go roaming round looking at "surrounding circumstances" and harkening to alleged conversations or transactions prior to or contemporaneous with the execution of the contract in order to gather the alleged intention of the parties. That would be to make a new contract for the parties and not to interpret the one which they did make. As is said in Parsons on Contracts (vol. 2, 8th ed., p. 495):

> But however important this inquiry (to ascertain the intention) may be, it is often insufficient to decide the whole question. The rule of law is not that the court will always construe a contract to mean what the parties to it meant, but rather that the court will give the contract the

> construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law will permit.

Surely it needs no extended argument to demonstrate that neither the language nor the acts of subordinate commissaries of the Army could operate to determine the meaning of the contract to which they were in no sense parties. Their authority in the premises is thus stated by Mr. Justice Brown in Pine River Logging Co. *v.* U. S. (186 U. S., 291):

> With the contracts before them, they [officers of the United States] had but one duty, and that was to see that they were honestly and faithfully carried out according to their terms and letter.

As for the attempt to enlarge the scope of claimant's contract by reference to the contracts with Swift & Co., it is to be observed that there is no sort of privity between these contracts, and that neither contains the slightest reference to the other. Furthermore, there is nothing in the provisions of the contracts with Swift & Co. to bear out this contention. They do not provide that Swift & Co. should furnish refrigerated beef for the use of the United States soldiers stationed at seacoast points and for no other use, but that they should furnish such quantities of refrigerated beef as might, from time to time, be called for by the Acting Commissary-General of Subsistence of the United States Army, and deliver the same at points on

the seacoast of the island of Cuba occupied by the United States Army. There is nothing in this provision to bar the various commissaries from using the beef thus delivered for the purposes of troops at interior points, and, as already shown, claimant's contract contains no such inhibition. This argument for appellant then comes to this: That although his own contract does not in any sense contain the provision contended for by him, yet by considering his contract in the light of an independent contract with a stranger, which also contains no such provision, the missing provision may somehow be spelled out of the two contracts.

Finally, it is very significant that at no time during the controversies between the claimant and the commissary at Habana relative to the supply of beef at Quemados did the claimant base his demand upon the contention that Quemados was an interior post. What he insisted was, simply, that under his contract he had the right to furnish all the beef required for the troops at Los Quemados, the only exception being that furnished under contract with Swift & Co. To this the Acting Commissary-General replied: "Simpson's contract embraces posts and camps in the interior of island and not seacoast points." This decision was communicated by Commissary Smith to the claimant, and so far as the record shows was not then contested by him. (Rec., p. 12.)

THE LOS QUEMADOS CLAIM.

As for that part of the claim which relates to the beef supplied to the troops at Los Quemados by others than the claimant, we deny absolutely the proposition of appellant that he was entitled under his contract to furnish all the beef used by the troops at that post, but contend that the claimant is entitled to recover in any event only for such freshly slaughtered beef as was furnished to that post, and then only upon establishing that Los Quemados was a military post in the interior of the island of Cuba within the meaning of the contract, and also that he was required by the commissaries to furnish such beef but was not allowed to comply with such requirement, which facts, we insist, do not appear.

LOS QUEMADOS NOT AN INTERIOR POINT.

It seems very clear that the post of Los Quemados is not in any sense an interior point in the island of Cuba or, in other words, a post remote from the sea coast (see Finding II, Rec., p. 9), and certainly not within the meaning of that expression as used in the contract. This seems apparent from the geography of the island. Between pages 10 and 11 of the Record will be found the map showing the location of this point relatively to the city of Habana, and to the sea-coast. From this it will be seen that, practically speaking, Los Quemados is a suburb of the city of Habana. It was at all events, as found by the court, "a site selected some 8 or 9 miles distant from Habana (the

latter being the nearest seacoast point on the island to which the United States transports could go) for the location of the main body of the United States troops in the vicinity of Habana." In other words, the troops allotted to Habana were posted in and around that city, but chiefly at Quemados. And for all practical purposes all these troops may properly be said to have been stationed at Habana subject to be dealt with by the commissary on the same terms.

When the Army of the United States reached Habana it was midsummer. The reputation of the city proper as an abiding place for yellow fever was known to all the world. In the exercise of proper precaution and with due regard to the safety and good health of the Army, the troops were disposed about the city on the outlying hills along the seacoast. There was naturally the ever-present fear and danger of an outbreak of yellow fever in the city. It was therefore desired to have the Army located so that it might, in case of necessity, be isolated from the city. After fully canvassing the situation it was also and for the same reasons decided that the refrigerating building and plant to be erected by Swift & Co. under the terms and provisions of their contract with the United States should be located at some point outside of the city, so that in the event of an outbreak of yellow fever supplies and provisions might be stored therein without having to pass through the city, and might be issued therefrom without interference by any quarantine which might be made against the city. The point at

Los Quemados was manifestly the most advantageous to be found. It was 2½ miles from Playade Mariano and 7 miles from the city of Habana. A railroad connected it with both points.

Should all go well and no fever break out in the city of Habana, the transports bearing the refrigerated beef might be unloaded in the harbor of Habana and the beef transported thence by rail to Los Quemados. In order to secure this safety the United States agreed with Swift & Co. to bear the expense of transporting the beef from the harbor at Habana to Los Quemados. Again, in case of an outbreak of fever at Habana, the transports conveying refrigerated beef from the United States could anchor outside the harbor of Playade Marianao, where they might be unloaded on lighters and the beef be transported thence to the refrigerating plant at Los Quemados. Yellow fever did not break out in Habana, and, as stated in finding 9, no beef was landed at Playade Marianao or transported therefrom to Los Quemados. All of these facts are not found by the court as specifically as stated herein. However, they are in the nature of historical truth. They can be substantiated by the record in the case of Swift & Co., No. 22395, now pending in the Court of Claims.

A consideration of the contract of the United States with Swift & Co. contemporaneous with the contract with the claimant materially aids in determining this question. By that contract Swift & Co. were to furnish for the use of the Army of the United States, such quantities of refrigerated beef, delivered at the points

on the seacoast of the island of Cuba occupied by the Army of the United States, as should from time to time be called for by the Acting Commissary-General of Subsistence of the United States Army. It will be noted that there is no limitation in that contract of the use of this refrigerated beef to United States soldiers occupying seacoast points. The provision is only that the refrigerated beef be delivered at seacoast points. In the exercise of common sense and acting in the best interests of the service, the various commissaries would unquestionably appropriate the beef thus delivered for the uses of all United States troops in the island that could be conveniently supplied with the same whether occupying posts directly upon the seashore or, as in the case of Los Quemados, a short distance from the seacoast, and easily and conveniently reached by railroad. For all practical purposes, the troops at Los Quemados could be as easily supplied with the refrigerated beef delivered at the city of Habana as the troops in Habana itself, and indeed, as already stated, the refrigerator of Swift & Co. for the storage of such beef thus delivered, was located not at Habana, but at Los Quemados, thus practically uniting for commissary purposes in one post Habana and Los Quemados.

But adopting the claimant's contention, Colonel Smith, depot commissary at the port of Habana, who, according to finding 10 (Rec., p. 12), seems also to have acted as commissary for Los Quemados, would be warranted in using refrigerated beef for the troops in Habana, which beef would be stored in the refriger-

ator at Los Quemados, but would be precluded, under claimant's contract, from using the same beef for the use of the troops at Los Quemados itself.

True, the Secretary of War decided that the camp at Los Quemados was an interior post, but this decision was practically a mere abstraction, for contemporaneously he, in effect, directed the Commissary-General to annul claimant's contract, so far as relating to the post of Los Quemados, which was forthwith done. Moreover, with all due respect, this decision has no binding force whatever. Neither in law nor by the terms of the contract did the Secretary have any power whatever to determine with authority this or any other question growing out of this contract. It was, as we shall contend later on, a matter resting in the sound discretion of the commissary of the post, whose decision was exactly contrary to that of the Secretary, and which decision was concurred in by the Acting Commissary-General.

LOS QUEMADOS NEVER DESIGNATED BY THE COMMISSARY AT THAT POST AS A POINT TO BE SUPPLIED BY THE CLAIMANT UNDER HIS CONTRACT, AND CLAIMANT NOT REQUIRED TO FURNISH THE BEEF WHICH IS THE SUBJECT OF THIS ACTION.

We contend that even if Los Quemados were an interior army post, within the meaning of claimant's contract, nevertheless, by the terms of that contract, he was neither obligated nor had the right to deliver beef at that post except when required by the commissary of the post so to do.

The contention of counsel for the appellant is that the claimant's contract related to such beef as might be required or needed for the use of the troops at all interior posts, but the contract does not so read. It provides that "the claimant shall deliver *to the commissaries* * * * at such prescribed hours, on such days as under the direction of their commanding officers *they* shall designate, such quantities of fresh beef * * * as from time to time *they* may require."

From this it is perfectly clear that the quantity of beef which the claimant was obliged to and had the right to deliver at any interior point was to be such quantity as the commissary of that post might require of him from time to time. This is borne out by the advertisement of the Commissary-General, pursuant to which the claimant made his accepted proposal upon which his contract was issued. This proposal provided: "Deliveries to be in such quantities, at such times, and in such places as the commissaries of the troops to be supplied shall designate."

In this view of the meaning of the contract, it lodged with the commissary, who had charge of supplies of the troops at an interior point in the island, a reasonable and necessary discretion as to the determination of the character and mode of the beef supply of the troops at his post. In the exercise of that discretion he might decide to have them supplied with refrigerated beef from a near-by seacoast refrigerator, or with fresh beef secured from animals slaughtered close at hand, or he might determine that it was for the best

interests of the post to procure their beef from the claimant. In such case, upon his requirement of the claimant, the claimant would be obliged and it would be his right to deliver the quantities of beef thus required and at the place and times designated by the commissary.

Our contention is not, as stated by appellant's counsel, that this discretion could extend to the practical annulment of claimant's contract through the purchase of all freshly slaughtered beef required for the use of troops at interior posts from others than the claimant. We contend only for that which the facts in this case demand—namely: That Commissary Smith exercised a sound and reasonable discretion vested in him by the contract with the claimant when he decided that, for the use of troops at Quemados, which in his judgment was not an interior post, he might lawfully furnish beef, whether refrigerated or freshly slaughtered, obtained from others than the claimant.

It is endeavored on behalf of appellant to establish that an arbitrary and unconscionable rule was adopted by the Commissary Department in deciding whether or not to call upon the claimant for deliveries of beef, and that this rule was to purchase beef from other sources when it could be obtained cheaper and only from the claimant when it was cheaper to buy from him. In support of this contention is cited the telegram of Acting Commissary-General Davis, of March 11, 1899: "Quality being same, take Simpson's. Price lower." (Rec., p. 14.) That telegram, however,

in no sense bears out this contention of appellant. It related not to freshly slaughtered beef purchased from Swift, but to beef slaughtered on the island by Swift & Co., and there refrigerated by them. As to such beef the Commissary-General decided that it practically came within the terms of Swift & Co.'s contract for refrigerated beef, although refrigerated in Cuba instead of in the United States. This seems to be eminently reasonable. It certainly was refrigerated beef and it would seem to be within the province of the commissary to accept under the contract with Swift & Co. beef thus refrigerated if satisfactory in quality; and it is difficult to imagine on what grounds claimant has the right to contest that decision.

In the further exercise of his sound discretion the Commissary-General decided that he would furnish to the troops in Cuba satisfactory beef thus refrigerated by Swift & Co., instead of freshly slaughtered beef, because the price of the same was lower. This decision, we contend, was characterized by absolute good faith and was in no sense arbitrary.

In every possible aspect of this case, then, it is contended by the United States that the decision of the Court of Claims should be sustained upon this appeal.

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Supreme Court of the United States.

No. 31.—October Term, 1905.

Greenlief W. Simpson, Appellant, vs. The United States. } Appeal from the Court of Claims.

[November 27, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This case arises upon a contract between the Commissary General of Subsistence and the claimant, by which it was agreed that the claimant should "deliver, to the commissaries of the United States troops stationed at such posts and camps as are situated in the interior of the island of Cuba at such prescribed hours on such days as, under the direction of their commanding officers they shall designate, such quantities of fresh beef . . . fit for immediate use . . . as from time to time they may require." The contract was to "be in force from the 5th day of January, 1899, to the 30th day of June, 1899, inclusive, or such less time for any post as the Commissary General of Subsistence, U. S. Army, may direct." The claims made are two, one for a refusal to take beef needed for troops at Los Quemados, during certain parts of the contract time, and another for a refusal to take it at Havana and Matanzas. The Court of Claims found the facts and dismissed the petition. The reasons for the judgment were not given, but manifestly were that, on the facts stated, the claimant had no claim, as matter of law.

The claim in respect of the ports of Havana and Matanzas is based on a talk with the Commissary General before the contract was made, in which that officer stated that it was the purpose and intent of the department to cover the entire beef supply for the Island of Cuba by two contracts; one with Swift & Co., for refrigerated beef, slaughtered in the United States and delivered at points on the seacoast, the other with the claimant, for fresh beef, and that when Swift & Co. could not furnish beef the claimant's contract covered the entire island, both interior and seacoast. It is enough to say that the claim based on this conversation flies in the face of the contract, which confines the undertaking of the United States to beef for camps in the interior. The conversation is inadmissible, and if admitted would not be definite enough to change the plain meaning of

the written words. *Brawley* v. *United States*, 96 U. S. 168, 173. *Simpson* v. *United States*, 172 U. S. 372, 379.

The claim in respect of Los Quemados raises two questions, or at least two were argued, one, whether the words "such quantities . . . as from time to time they may require," mean such quantities as the commissaries may make requisition for, or such quantities as they may need, the other, whether the camp at Los Quemados was "situated in the interior of the island," within the true intent of the contract. Our opinion upon the latter will dispose of the case.

Los Quemados was the camp of the main body of troops in the vicinity of Havana, and about six or eight miles from that city. It was about two miles and a-half from the beach of Marianao, and connected with both points by rail. There was a refrigerator plant there which had been erected by Swift & Co., so that if the claimant regarded his contract as the supplement to that of Swift & Co., there was notice on the face of the earth that this point was supposed to be within their territory. The original advertisement for proposals, referred to by the claimant when he made his offer, spoke of "posts remote from the seacoast," a later one, also referred to, read "posts and camps in the interior of the island." Obviously the two phrases were used as meaning the same thing, and they may be considered in interpreting the word "interior" in the contract, *Bradley* v. *Washington, Alexandria and Georgetown Steam Packet Co.* 13 Pe. 89, 101. *Stoops* v. *Smith*, 100 Mass. 63, 65, 66. *Prouty* v. *Union Hardware Co.*, 176 Mass. 155, 158. *Bank of New Zealand* v. *Simpson*, 1900, App. Cas. 182. *Bruce* v. *Moon*, 57 So. Car. 60, 68, 69. 4 Wigmore, Evidence, § 2465. When performance of the contract began in January, 1899, beef was not ordered of the claimant for this camp. On the 26th he protested, but not on the ground that Los Quemados was situated in the interior of the island. His complaint was that he was to furnish all the fresh beef except that furnished under Swift & Co.'s contract. The reply from the acting Commissary General, and the local Chief Commissary, was that his contract embraced camps in the interior, "and not seacoast points," thus showing how the contract was construed at that time. He does not appear to have suggested a different view, although he seems to have kept on trying to get what orders he could. During January and February beef was purchased from third parties. On February 21 he was notified that commissaries throughout the island had been instructed to call on him to furnish fresh beef under his contract whenever Swift & Co. could not do so under theirs, and he furnished beef for Los Quemados for the first thirteen days of March and was paid for it. But it will be observed that this action again was not on the ground that Los Quemados was a camp in the interior. While insufficient to modify the

contract in the sense of the claim first discussed, it was based on the willingness which the claimant had shown to furnish beef to that greater extent. Pursuant to the notice it would seem that he furnished beef to various points upon the coast.

On March 13 the call upon the claimant was stopped and he again protested. On May 4 the Secretary of War decided that the camp at Quemados was an interior post, but called the attention of the Commissary Department to the clause in the contract providing that it should be in force from January 5 to June 30, 1899, or such less time for any post as the Commissary of Subsistence might direct. Accordingly the Commissary General notified the claimant that "the suspension of the delivery of fresh beef under your contract . . . is hereby made to cover the life of the contract in so far as it relates to the post of Quemados." The claimant, of course, relies upon this construction of his contract so far as it favors him, while he repudiates the attempt to terminate his rights under the last quoted clause. But this interpretation was after the event and was not accepted or acted upon otherwise than to give the notice just mentioned. As we have shown, the contemporary construction by the men on the spot was different, and seems to have been accepted by the claimant. Taking the instrument in connection with the facts that for camping purposes Quemados was Havana, and that, as between the parties, interior meant remote from the seacoast, we are of opinion that the United States did not promise to take beef from the claimant at that point.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.